(1)

Supreme Court, U.S.
FILED

No. 021304 MAR 4 20[illegible]

In the
Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

87 pp

QUESTIONS PRESENTED

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation.

3. Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Judicial Proceedings 5

REASONS FOR GRANTING THE WRIT 7

I. THE DECISION BELOW CONFLICTS WITH THE SEMINAL DECISIONS OF THIS COURT AND DECISIONS OF OTHER LOWER COURTS ON THE SCOPE OF THE PUBLIC TRUST DOCTRINE ... 8

A. The Ninth Circuit's Restrictive Interpretation of the Public Trust Doctrine Conflicts with This Court's Decisions on the Scope and Source of the Public Trust Doctrine 8

B. The Ninth Circuit's Restrictive View of State Power to Define the Public Trust Doctrine Is Irreconcilable with Other Federal Decisions 13

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW ON WHETHER FEDERAL COURTS MAY MODIFY A STATE'S UNDERSTANDING OF THE PUBLIC TRUST DOCTRINE AND DECLARE THE MODIFIED DOCTRINE A "BACKGROUND PRINCIPLE OF THE STATE'S LAW OF PROPERTY" THAT PRECLUDES ECONOMICALLY BENEFICIAL USE OF LAND 16

TABLE OF CONTENTS—Continued

Page

III. THE DECISION BELOW DEEPENS A CONFLICT AMONG THE LOWER COURTS ON WHETHER A PROPERTY OWNER MAY RAISE A SUBSTANTIVE DUE PROCESS CLAIM WHEN HE MAY ALSO RAISE A CLAIM UNDER THE TAKINGS CLAUSE 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Armanderiz v. Penman, 75 F.3d 1311 (9th Cir. 1996) 20

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 21

Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Cal. 1980) 15-16

Caminiti v. Boyle, 732 P.2d 989 (Wash. 1987) .. 3, 9, 10, 18

Dardar v. LaFourche Realty Co. Inc, 985 F.2d 824 (5th Cir. 1993) 13-14-15

Davidson v. Washington, 802 P.2d 1374 (Wash. 1991) ... 3

Draper Machine Works v. Department of Natural Resources, 815 P.2d 770 (Wash. 1991) 12

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 6

Eastlake Community Council v. Roanoke Associates, Inc., 513 P.2d 36 (Wash. 1973) 11

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990) 21

Graham v. Connor, 490 U.S. 386 (1989) 20-21

Harris v. City of Akron, 20 F.3d 1396 (6th Cir. 1994) 21-22

Harris v. Hylebos Indus., Inc., 505 P.2d 457 (Wash. 1973) ..... *passim*

Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) ..... *passim*

Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983) 15

TABLE OF AUTHORITIES—Continued

Page

Lucas v. South Carolina Coastal Council,
505 U.S.1003 (1992) 6, 16-17

Morse v. Oregon Division of State Lands,
590 P.2d 709 (Or. 1979) 15

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 21

Orion Corp. v. Washington,
747 P.2d 1062 (Wash. 1987) 10

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 17, 19

Pearson v. City of Grand Blanc,
961 F.2d 1211 (6th Cir. 1992) 21-22

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) 8, 9, 12-13, 19

Port of Seattle v. Oregon & Wash. R.R.,
255 U.S. 56 (1921) 6-7, 12

Portage Bay-Roanoke Park Community Council v. Shoreline Hearings Board,
593 P.2d 151 (Wash. 1979) 12, 18

Rettkowski v. Department of Ecology,
858 P.2d 232 (Wash. 1993) 11

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 21

Scott v. Greenville County,
716 F.2d 1409 (4th Cir. 1983) 21

Stevens v. City of Cannon Beach,
510 U.S. 1207 (1994) 19

The John Corp. v. City of Houston,
214 F.3d 573 (5th Cir. 2000) 21

TABLE OF AUTHORITIES—Continued

Page

United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) 20

United States v. Lanier, 117 S. Ct. 1219 (1997) 20

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 21

Washington v. Sturtevant, 135 P. 1035 (Wash. 1913) .. 3, 18

Weden v. San Juan County, 958 P.2d 273 (Wash. 1998) ... 9

West Indian Company, Ltd. v. Virgin Islands, 844 F.2d 1007 (3d Cir. 1988) 13-15

Constitutions

U.S. Const. amend. IV 1

amend. XIV 1

Wash. Const. art. XVII 3

Statutes

28 U.S.C. § 1257(a) 1

Seattle Municipal Code § 23.60.014 4

Miscellaneous

Callies, David L. & Breemer, J. David, *Selected Legal and Policy Trends in Takings Law: Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002) .. 19

Conte, Kenan R. *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982*, Nov. 1982 ..... 3, 18

TABLE OF AUTHORITIES—Continued

Page

Johnson, Ralph W. & Cooney, Eileen M., *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275 (1979) 4

Lazarus, Richard J., *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631 (1986) ... 10

Sax, Joseph, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970) 9, 11, 18

PETITION FOR WRIT OF CERTIORARI

Esplanade Properties respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 2002 U.S. App. LEXIS 20802 (Oct. 3, 2002); it appears as Exhibit A to the petition. The decisions of the Federal District Court for the Western District of Washington are not reported; they appear at Appendices C and D to the petition.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 3, 2002. Petition Appendix (Pet. App.) at A-1. On December 13, 2002, the court denied the petition for rehearing and rehearing en banc. Pet. App. at B. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 1991, Esplanade Properties purchased platted lots of real property located within the harbor of the City of Seattle. The lots are designated as "first class tidelands," a classification reserved for tideland properties that may be privately developed without detracting from the public trust. Esplanade accordingly applied to the City to construct nine above-water, single-family residential homes.

At the time of the application, both the City zoning code and its overlay shoreline regulations permitted Esplanade's proposed residential housing development. However, the zoning code also required residential development to include on-site parking, while the shoreline regulations absolutely prohibited on-site parking. When Esplanade attempted to overcome this regulatory "Catch-22" by seeking a variance, the City cancelled Esplanade's application as a whole. It subsequently refused to reconsider its decision. During the same period, the City amended its shoreline regulations to make the effect of its contradictory parking regulations explicit, absolutely prohibiting residential development on tidelands like Esplanade's.

As a result of the City's actions, Esplanade filed this suit in Washington state court against Respondent City, alleging that the City effected a compensable taking of Esplanade's private property in violation of the Fifth Amendment to the United States Constitution, as incorporated in the Fourteenth Amendment to the Constitution. Esplanade also alleged that the City had deprived Esplanade of due process within the meaning of the Fourteenth Amendment to the United States Constitution. The City removed the case to the federal courts, where it has remained. Esplanade did not prevail in the courts below and now seeks relief from this Court for the federal constitutional errors committed by the United States Court of Appeals for the Ninth Circuit.

A. Factual Background

Upon attaining statehood in 1889, the State of Washington assumed ownership of all tidelands "up to and including the line of ordinary high tide." Wash. Const. art. XVII. Soon after, the Washington Legislature established harbor areas in front of incorporated cities. *See generally Davidson v. Washington*, 802 P.2d 1374 (Wash. 1991). It designated the waters farthest landward of the harbor lines as "first-class" tidelands and directed that these lands be appraised for conveyance into private ownership to facilitate commercial and industrial development. *See* Pet. App. at F-1 to F-9 (Kenan R. Conte, *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982*, Nov. 1982) (Master's Thesis).[1]

Subsequent sales of parcels located landward of the inner harbor line conveyed title in fee simple absolute. *See Davidson*, 802 P.2d at 1379 (noting that a 1916 decision "held that shoreland owners hold title inside the harbor line in fee simple absolute"). As a result, conveyances of first-class tidelands to private parties have traditionally included the ability to develop the lands. *Harris v. Hylebos Indus., Inc.*, 505 P.2d 457, 462 (Wash. 1973) ("the legislature has regarded the filling and improving of first class tidelands, particularly in commercial harbors, as an aid to navigation, rather than an obstruction"); *Washington v. Sturtevant*, 135 P. 1035, 1040 (Wash. 1913) ("The state has invited investment in these lands upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes.").

---

[1] Mr. Conte's thesis has been recognized by the Washington Supreme Court as an authoritative source of information regarding the history of Washington's tideland policy. *See Caminiti v. Boyle*, 732 P.2d 989, 996 (Wash. 1987).

Esplanade's property consists of several platted lots of "first-class" tidelands.[2] Pet. App. at D-1. The state originally sold these lots into private ownership in 1906. Esplanade acquired title in 1991, intending to develop the property as single-family residences. Pet. App. at A-2. In June, 1992, Esplanade applied to the City for the necessary development permits. *Id.*

To constitute a permissible development along the Seattle shoreline, a proposal must satisfy the City's zoning code and its supplemental shoreline regulations. *See* Seattle Municipal Code § 23.60.014(A). When Esplanade submitted its development application, Esplanade's property was zoned exclusively for single-family residential uses of medium density. Pet. App. at C-2. For purposes of the shoreline regulations, the property was classified as a Conservancy Recreation Environment (CR), which at that time permitted the construction of above-water residential housing. Pet. App. at A-1; Pet. App. at C-2 (above-water residential development permissible on lots with less than 30 feet of dry land).

The City subsequently amended its shoreline code to prohibit residential development on lots in the CR area, such as Esplanade's, that lack at least fifteen feet of dry land. However, Esplanade successfully vested its application under the earlier, more permissive CR rules. *See* Pet. App. at A-2. Nevertheless, the City denied Esplanade's allowable residential development after expressing concerns over the size and design of the project and, more importantly, Esplanade's intent to provide on-site parking. Pet. App. at C-3. Esplanade responded to these

---

[2] For a schematic diagram illustrating the location of first-class tidelands relative to harbor lines and areas, *see* Pet. App. at E (excerpt from Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275, 291 (1979)).

concerns by seeking a formal clarification of the City's regulatory code.

"On the issue of parking—the issue most central to this litigation—the City interpreted its [shoreline] code to *prohibit* parking built over water in a single-family zone, but found that generally [under the zoning code], single-family homes *required* on-site parking." Pet. App. at C-3 (emphasis added). Esplanade immediately challenged this interpretation in Washington state court, but did not prevail. Pet. App. at A-3. Faced with a regulatory regime that both required and prohibited on-site parking for its otherwise permissible residential development, Esplanade applied to the City for a variance.[3] This prompted the City to cancel Esplanade's application as a whole. It subsequently refused to reconsider its decision. Pet. App. at A-5.

B. Judicial Proceedings

Esplanade timely challenged the City's cancellation of its application in state court, alleging various constitutional violations. In particular, Esplanade claimed that it had suffered a compensable regulatory taking under the Takings Clause of the Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, on the theory that the City had permanently deprived Esplanade of all economically beneficial use of private property. *See* Pet. App. at C-1 to C-2. Esplanade also alleged that the City had violated Esplanade's substantive due process rights by arbitrarily and capriciously cancelling its application. The City promptly removed the case to the Federal District Court for the Western District of Washington. Pet. App. at D-1. There, the City did not dispute the contention that Esplanade was without economically

[3] Esplanade sought the parking variance after informing the City that it was willing to amend its plans to meet the City's design and size concerns, but did not see how it could possibly satisfy the parking requirement/prohibition without a variance. *See* Pet. App. at C-4.

beneficial use of property, but claimed that this state of affairs was neither caused by the City's actions nor was justifiable under the public trust doctrine. *See* Pet. App at C-2 ("The City claims that the property has no viable economic use, even without the City's regulations"); *id.* at C-13 (City argues that "the 'public trust' doctrine and the SMA are two 'background principles that preclude this type of development.'").

In 2001, the district court issued orders rejecting the due process claim and the takings claim. Pet. App. at C, D. On October 3, 2002, the United States Court of Appeals for the Ninth Circuit affirmed. Relying on a prior circuit court decision, and distinguishing this Court's opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the court below held that Esplanade was absolutely precluded from asserting its substantive due process claim because it was able to raise a claim under the more "explicit" protections of the Takings Clause of the Fifth Amendment. Pet. App. at A-6 to A-7. The court then concluded that Esplanade could not prevail on its available takings claim because the public trust doctrine encumbered Esplanade's property with an inviolable easement in favor of public recreation. *Id.* at A-8 to A-12.

While recognizing that the public trust doctrine normally includes a private interest (the "*jus privatum*") as well as a public interest, the court concluded that only the public use aspect was relevant to the issue of whether Esplanade could make any economically beneficial use of its property. *Id.* at A-6. From this perspective, the court held that the public recreational interest protected by the public trust doctrine was a "background principle" of property law, within the meaning of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Id.* As such, the state was "obligated" to prevent Esplanade from using the property in a manner inconsistent with this interest and the City was therefore absolved of any liability if it rendered Esplanade's property economically idle. *Id.* at A-10, A-12; *contra Port of Seattle v. Oregon & Wash.*

R.R., 255 U.S. 56, 65 (1921) ("In every case the state [of Washington] may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit."). The court later denied Esplanade's petition for rehearing and rehearing en banc. *See* Pet. App. at B.

As a result of these rulings, the State of Washington has been denied its sovereign authority to identify private interests in public trust waters and lands in a manner that appropriately balances its needs and interests with the requirements of the public trust doctrine. Instead, "first-class" tidelands designated by the state for economic development are now hostage to a federally-mandated public recreational easement. The ultimate result is that Esplanade and similarly-situated landowners are barred from putting their property to developmental use and from seeking just compensation for, *or* invalidation of, the requirement that they leave their property in a natural state for public use.

REASONS FOR GRANTING THE WRIT

On three important questions of takings law and substantive due process law, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of these conflicts warrant resolution by this Court.

I

THE DECISION BELOW CONFLICTS WITH THE SEMINAL DECISIONS OF THIS COURT AND DECISIONS OF OTHER LOWER COURTS ON THE SCOPE OF THE PUBLIC TRUST DOCTRINE

It is a general principle of property law that, upon entry to the Union, the states assumed ownership of lands covered by tidewaters and a corresponding duty to keep sufficient areas of these lands open for public navigation, recreation, and commerce. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472-77 (1988). In this case, the Ninth Circuit held that this principle, the public trust doctrine, "alone precluded" residential development of Esplanade's tidelands and that the state is required to enforce this interpretation of the doctrine. This ruling is in manifest conflict with this Court's statements on the public trust doctrine, the law of Washington, and with the decisions of lower federal courts.

A. The Ninth Circuit's Restrictive Interpretation of the Public Trust Doctrine Conflicts with This Court's Decisions on the Scope and Source of the Public Trust Doctrine

In the seminal case of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), this Court described the contours of the public trust doctrine. Specifically, this Court declared that, when it comes to navigable waters, the states may not convey vast tracts of submerged land into private hands free of the state's duty to protect the public interest in navigation, commerce, and fishing. However, the *Illinois Central* Court carefully noted that the state *can* so convey individual parcels if doing so is in the public interest or does not cause "substantial impairment of the public interest in the lands and waters *remaining*." *Id.* at 453, 455-56 (emphasis added). Indeed, *Illinois Central* explained that private development was consistent with the public trust doctrine in these circumstances:

> It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained . . . as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State.
>
> *Illinois Central*, 146 U.S. at 452.[4]

Almost a century after the *Illinois Central* decision, this Court affirmed that "the individual States have the authority to define the limits of the lands held in public trust and to recognize *private rights* in such lands as they see fit." *Phillips Petroleum Co.*, 484 U.S. at 475 (emphasis added). The State of Washington is among those states that have exercised this authority by adhering to the doctrine articulated in *Illinois Central*. *See, e.g.*, *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998) ("The control of the State for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, *or* can be disposed of without any substantial impairment of the public interest in the *lands and waters remaining*.") (emphasis added); *see also Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987)

---

[4] A leading commentator on the public trust doctrine has explained the limited holding of *Illinois Central* as follows:

> [T]he Court did *not* actually prohibit the disposition of lands to private parties; its holding was much more limited. What a state may not do, the Court said, is divest itself of authority to *govern the whole area* in which it has responsibility to exercise its police power.

Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 489 (1970) (emphasis added).

(same). Accordingly, Washington has permitted private development of specified tideland parcels. *See Harris v. Hylebos Indus.*, 505 P.2d 457, 461 (Wash. 1973) ("[T]he notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood.").

The Ninth Circuit's view of the public trust doctrine radically departs from the principles established by this Court in *Illinois Central*, as adopted into Washington law. Perhaps most significantly, the lower court's definition of the doctrine leaves out the important clarification that the state may abdicate control over tidelands when there is no "substantial impairment of the public interest in the *lands and waters remaining*;" i.e., when the state retains control over other lands and waters sufficient for navigational and recreational interests. *See Illinois Central*, 146 U.S. at 452; *Caminiti v. Boyle*, 732 P.2d at 994 (emphasis added).

Without a due regard for lands that remain under state control, the lower court's public trust rule bars divestiture of an interest in a tideland parcel when such action harms the public's ability to use the subject parcel itself, rather than when it jeopardizes the public trust as a whole.[5] In other words, a net

---

[5] The court below relied on *Orion Corp. v. Washington*, 747 P.2d 1062 (Wash. 1987), to support the conclusion that harm to public recreational interests prevents residential use of Esplanade's tidelands. But *Orion* is inapposite. That case dealt with a proposal to dredge and fill *5,600 acres* of *second-class tidelands*. *See Orion*, 747 P.2d at 1064-68. In contrast, this case involves residential development of fifteen residentially-zoned lots located on *first-class* tidelands, an area that the state has previously designated for development. The most recent Washington decision specifically dealing with private development of first-class lands concluded that

(continued...)

loss of a public trust interest becomes sufficient to prevent the state from disposing of an interest in tidelands. But the *Illinois Central* formulation is that

> [n]o grant may be made to a private party if that grant is of such amplitude that the state will effectively give up its authority to govern, but a grant is *not illegal solely because it diminishes in some degree the quantum of traditional public uses.*

Sax, *supra,* at 489 (emphasis added); *see also Eastlake Community Council v. Roanoke Associates, Inc.*, 513 P.2d 36 (Wash. 1973) (residential development landward of harbor lines does not impermissibly impair navigability).

The *Illinois Central* principles that control in Washington also allow the state to dispose of tideland parcels when the state determines that this advances a general public interest. *See Rettkowski v. Department of Ecology*, 858 P.2d 232, 239 (Wash. 1993) (state may grant tideland interests to private parties in a way that hinders public access to promote "the overall interests of the public"). Yet, under the lower court's framework, the state may give up its "interests in state waters," which includes public recreation, only if doing so does not "impair the public's interest," which is defined solely in terms of general recreation. Pet. App. at A-12 to A-13. This circular rule effectively prevents the state from conveying control over tidelands for anything other than public recreational purposes, even if it determines that development, or some other use, best serves the public welfare. *Id.* at A-10 ("the public trust doctrine ran with the title to tideland properties and *alone precluded* the shoreline residential development") (emphasis added).

---

[5] (...continued)
such development was consistent with the state's public trust doctrine. *See Harris*, 505 P.2d at 466-67.

By so rejecting established *Illinois Central* principles, the lower court dramatically reduces the states' power to define and apply the public trust doctrine. In fact, according to the court below, the State of Washington is "*obligated*" to adhere to a public trust doctrine that bars a "proposal to construct pilings, driveways and houses" in tidelands. Pet. App. at A-11 to A-12 (emphasis added). But, according to this Court and the Washington Supreme Court, the state is free to follow a public trust doctrine that permits private development of certain tidelands. *See Port of Seattle*, 255 U.S. at 65 ("The State may in one year fill and sell the hundred feet of tide lands nearest the upland and in the next year fill and sell the parcel beyond. Or it may sell first the parcel more remote from the upland and later the one immediately adjoining it, or any other. In every case it may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit"); *Roanoke Cmty. Council v. Shoreline Hearings Bd.*, 593 P.2d 151, 153 (Wash. 1979) (state's "public benefit" doctrine permitted "substantial development" of floating homes and related facilities"); *Draper Machine Works v. Dep't of Natural Res.*, 815 P.2d 770, 775 (Wash. 1991) (the state may sell and lease tidelands landward of the open waterway to private owners for development).

This sudden and drastic alteration of the substance of the public trust doctrine, and the state's power to define that doctrine, raises great uncertainty as to the ability of the states to adhere to a public trust doctrine that follows the *Illinois Central* guidelines. In particular, the decision below indicates that states simply cannot convey developmental interests in tideland parcels, in accordance with *Illinois Central*, if this diminishes public recreation on those same parcels. Moreover, under the Ninth Circuit's ruling, lands previously conveyed and developed at the direction of the state should remain impressed with a public recreational easement. For these reasons, the decision below will surely "disrupt the settled expectations of landowners" in Washington and every state within the Ninth

Circuit's jurisdiction. *Phillips Petroleum*, 484 U.S. at 485 (O'Connor, Stevens, and Scalia, JJ., dissenting).

This Court should grant the petition to reaffirm the state's power to define the scope of the public trust doctrine in accordance with *Illinois Central* and to protect the expectations of property owners who have relied on the state's attempts to do so.

B. The Ninth Circuit's Restrictive View of State Power to Define the Public Trust Doctrine Is Irreconcilable with Other Federal Decisions

The Ninth Circuit's restrictive interpretation of the public trust doctrine is in conflict with other circuits as well as with this Court and the courts of Washington. In *West Indian Company, Ltd. v. Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988), for example, the Third Circuit considered whether an early grant of harbor lands to a private company was valid under the public trust doctrine. Sanctioned by the Legislature, the grant provided the company with the authority to reclaim submerged portions of a bay, specifically for "development of the harbor." *West Indian Co.*, 844 F.2d at 1020. In reviewing the grant's consistency with the public trust doctrine, the court looked primarily to *Illinois Central*. *Id.* at 1018-19. It interpreted that case as allowing the alienation of the submerged parcels for private development given that the Legislature determined that this served the public interest and would not harm the Legislature's ability to control the rest of the harbor. *Id.* at 1019-21. Finally, the court noted that "[h]arbor development . . . has consistently been recognized as a legitimate public purpose for which submerged lands may be conveyed out of trust." *Id.* at 1020 n.21.

A similarly broad view of the state's power to determine the nature of the public trust doctrine is evident in *Dardar v. LaFourche Realty Co. Inc.*, 985 F.2d 824 (5th Cir. 1993). There, members of the public asserted the right to use privately controlled Louisiana lands covered by waters indirectly

influenced by the tide. In considering whether such lands could be alienated in fee to private owners, the court noted that *Phillips Petroleum* left the determination of the scope of rights in potential public trust lands to state law. Accordingly, the court recognized that "Louisiana *may* transfer ownership of tidelands to private parties if permitted by state law." *Id.* at 830 (emphasis added). Acknowledging that Louisiana had determined that land "indirectly" inundated by the ebb and flow of the tide could be conveyed in entirety, the court upheld the private title holders' right to exclude the general public. *See id.* at 829-31.

The Ninth Circuit's decision is irreconcilable with *West Indian Company* or *Dardar*. Both cases recognize that state law and policy govern the public trust doctrine even when it goes so far as to grant private parties exclusive control of tideland parcels. *See West Indian Co.*, 844 F.2d at 1019 ("If the conveyance represents a deliberate and reasonable decision of the sovereign that the transaction of which the conveyance is a part affirmatively promotes the public interest in the submerged lands, the courts have deferred to the sovereign's decision."). They further acknowledge that states may treat development of tidelands as a legitimate interest under the public trust and are therefore free to recognize private property rights in such lands.

In contrast, the Ninth Circuit effectively rejects state sovereignty over the public trust doctrine. Unlike *Dardar*, the decision below does not permit the state to abrogate control of well-defined tidelands to private parties when such action conflicts with public recreation. Pet. App. at A-16. And unlike *West Indian Co.*, general "[h]arbor development"[6] is not a "legitimate public purpose for which submerged lands may be conveyed out of trust." *Cf. West Indian Co.*, 844 F.2d at 1020

---

[6] The "harbor development" upheld in *West Indian Co.* as consistent with the public trust included "development near the downtown area" and development for "offices," and thus did not refer solely to creation of the harbor itself. *See West Indian Co.*, 844 F.2d at 1020.

n.21. The lower court's disdain for the principles of *Dardar* and *West Indian Co.* is clearly shown by its refusal to give any weight to the Washington Shoreline Management Act, which gives "priority for single family residences" when it comes to the development of tidelands. Wash. Rev. Code § 90.58.020.

The court does all this in order to keep Esplanade's property in its natural state for the benefit of the public. This decision is not valid judicial recognition of the modern public trust doctrine, since "[a]chievement of modern environmental protection and resource conservation goals . . . ultimately depend not so much on an 'expansion' of public trust values as it may require a *repudiation* of the doctrine's focus and traditional values." Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 710 (1986) (emphasis added). Here, the Ninth Circuit has unilaterally repudiated the Washington Legislature's decision to permit commerce and industry in "first-class" tidelands and the state judiciary's determination that such a decision is in line with the public trust doctrine.

This restrictive federal version of the public trust now applies to the entire coast of Washington state and may very well alter the disposition of tidelands beyond Washington. In most states, the public trust doctrine "has developed in a manner consistent with the analysis of *Illinois Central*." *West Indian Co.*, 844 F.2d at 1019. Accordingly, it is generally recognized that legislatures have the power to provide for filling and development of limited tideland areas consistent with the public trust. *See, e.g.*, *Morse v. Oregon Division of State Lands*, 590 P.2d 709, 711 (Or. 1979) (Legislature may permit filling of tidelands for nonwater related purposes where public need outweighs recreational interests); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1092-94 (Idaho 1983) (state bodies may alienate interests in public trust resource for construction of private yachting facilities); *see also Berkeley v. Superior Court of*

Alameda County, 606 P.2d 362, 369 (Cal. 1980) (statutes may abandon the public trust on parcels within San Francisco Bay if "intent to abandon [is] clearly expressed or necessarily implied"). The Ninth Circuit's interpretation of the public trust doctrine is inconsistent with these decisions and thus opens the door for local governments in these jurisdictions to bar all economic use of tidelands without fear of liability. To resolve the conflicts among the lower courts regarding the state's power to permit private economic development of navigable waters, this Court should grant the petition.

II

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW ON WHETHER FEDERAL COURTS MAY MODIFY A STATE'S UNDERSTANDING OF THE PUBLIC TRUST DOCTRINE AND DECLARE THE MODIFIED DOCTRINE A "BACKGROUND PRINCIPLE OF THE STATE'S LAW OF PROPERTY" THAT PRECLUDES ECONOMICALLY BENEFICIAL USE OF LAND

When the government has otherwise effected a regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, it has only one escape from the obligation to provide just compensation: "it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). In other words, the government can avoid compensatory liability when the relevant use restrictions "inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place on land ownership." *Id.* at 1029 (emphasis added).

In *Lucas*, this Court elaborated on the nature and limits of the "background principles" exception:

> Any limitation so severe [as to eliminate all economically beneficial use of property] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts . . . .

Lucas, 505 U.S. at 1029.

In the more recent case of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court reiterated that the "background principles" concept refers to well-known legal principles of the law of property:

> [The background principles exception] is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.

Palazzolo, 533 U.S. at 630.

In short, elimination of all economically beneficial uses of property "may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas*, 505 U.S. at 1032 n.18. The Ninth Circuit's conclusion that the public trust doctrine requires the state to render Esplanade's property developmentally idle does not meet this standard.

The "common, shared" understanding of the public trust doctrine, rooted in *Illinois Central*, is that the state may choose to permit private development and use of specific tideland parcels

consistent with the public trust doctrine. Washington long ago made this choice, deciding that tidelands between an established inner harbor line (normally coequal to the line of low tide) and the ordinary high water mark should and could be conveyed for private development. *See Sturtevant*, 135 P. at 1037 ("The area lying between high water and the line of navigability, as fixed or to be fixed by the inner harbor line, being, whether submerged or not, theoretically nonnavigable, is treated as land and not water."); *see generally* Pet. App. at F-1, (Conte, supra) Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275, 301-02 (1979). The Washington Legislature and courts have continued to recognize and protect developmental rights in first-class tidelands. *Harris*, 505 P.2d at 466 (First-class tidelands "have never been classified by the state as navigable waters, but rather have been treated as land. Particularly, where such lands lie in city harbors, as here, they have been regarded as most suitable for reclamation and for dedication to the purposes of commerce and industry.").

In enacting the comprehensive Shoreline Management Act of 1971, the state reaffirmed that residential development—the "nature of the land use proscribed" here— is permitted on tidelands: "it is within the contemplation of the legislation that there will, of necessity, be some future and additional development along shorelines in the state, *including over-the-water construction*, and it does not purport to totally prohibit such development." *Portage Bay*, 593 P.2d at 153 (emphasis added). And the Washington Supreme Court has stated that "the requirements of the 'public trust doctrine' are *fully met* by the legislatively drawn controls imposed by the Shoreline Management Act of 1971." *Caminiti*, 732 P.2d at 995 (emphasis added); *see also Portage Bay*, 593 P.2d at 153 ("any common-law benefit doctrine this state may have had prior to 1971 . . . has been superceded and the SMA is the present declaration for that doctrine"). Consequently, for many first-class tideland owners,

nothing in state or federal law, including the public trust doctrine, has categorically prevented the economic use of their property. Imposition of a contrary standard on Esplanade cannot be reconciled with the equitable and fair nature of the "background principles" exception. *Palazzolo*, 533 U.S. at 630 (a "common-law rule cannot be a background principle for some owners but not for others").

Indeed, in light of Washington's understanding of the public trust doctrine, the Ninth Circuit's restrictive version of the doctrine cannot be a "background principle"exception for purposes of takings analysis. Given the state's long-standing and carefully crafted recognition of private rights in first-class tidelands, the state law moorings necessary to uphold the lower court's finding of a "background principle" are simply absent. And without a solid state law foundation, the lower court's discovery of such a principle amounts to a judicially-decreed evisceration of a traditional private property right. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia & O'Connor, JJ., dissenting from denial of certiorari); *see also* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 379 (2002) ("newly discovering or expanding such principles in order to protect resources now deemed valuable . . . is inconsistent and irreconcilable with the protection of private rights in land"). This result not only violates Lucas's statement that restrictive background principles may not be "newly legislated or decreed," it utterly ignores this Court's emphatic conclusion that the states are free to protect private rights in tidelands. *See Phillips Petroleum Co.*, 484 U.S. at 475.

To resolve the important question of whether the Ninth Circuit may create a federal public trust "background principle" that conflicts with this Court's own limited, state-law based conception, it is incumbent on this Court to grant the petition.

III

THE DECISION BELOW DEEPENS A CONFLICT AMONG THE LOWER COURTS ON WHETHER A PROPERTY OWNER MAY RAISE A SUBSTANTIVE DUE PROCESS CLAIM WHEN HE MAY ALSO RAISE A CLAIM UNDER THE TAKINGS CLAUSE

The court below held that because Esplanade could raise a claim for just compensation under the more "explicit" protections of the Fifth Amendment's Takings Clause, it was precluded from also alleging that the City had violated its rights to due process of law. Pet. App. at A-8 to A-9.[7] This narrow interpretation of the scope of due process protections is irreconcilable with the decisions of this Court and the decisions of other federal courts.

The lower court purports to rest its refusal to allow a property owner to claim a violation of the Due Process Clause when the Takings Clause may provide relief on *Graham v. Connor*, 490 U.S. 386 (1989). But *Graham* held only that excessive force claims properly arise under the Fourth Amendment rather than the substantive due process guarantees of the Fourteenth Amendment. *See Graham*, 490 U.S. at 395. Accordingly, this Court has never applied *Graham* to preclude a substantive due process claim outside of cases involving Fourth Amendment protections.[8] Neither has this Court repudiated the many cases recognizing that

---

[7] The lower court relied on its earlier decision in *Armandariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). *Aremendariz* involved an allegation of a "private taking," i.e., that property had been taken for improper private purposes. The court held that this unique type of takings claim must be challenged under the public purpose aspect of the Takings Clause, instead of through substantive due process protections. *Armendariz*, 75 F.3d at 1324.

[8] This Court's post *Graham* jurisprudence has repeatedly clarified that *Graham* is to be applied sparingly. *See United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 499 (1993).

a property owner may resort to substantive due process principles when challenging governmental action adversely affecting the use of property. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-95 (1926).

Nevertheless, the court below has extended *Graham* to hold that the Takings Clause always subsumes a claim that government has deprived a person of property in contravention of substantive due process guarantees. While a few other circuits have adopted a similar view, *see, e.g.*, *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), most have refused to adopt this categorical rule. *See The John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000) ("a blanket rule that under *Graham*, the Takings Clause subsumes any substantive due process claim relating to a deprivation of property is both inconsistent with our precedents and . . . a majority of other circuits"); *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994) (due process bars actions that are unreasonable and may not take place no matter what procedural protections accompany them); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (rejecting argument that all "arbitrary and capricious" substantive due process claims are subsumed in takings claims); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) ("where there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrators refusal to issue' a building permit, a Fourteenth Amendment claim is properly stated").

Consequently, the circuit courts are in manifest conflict on the remedy for property deprivations that are so unreasonable as to be arbitrary. Those that recognize an independent substantive due process claim necessarily view invalidation as the appropriate relief. *See Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990) ("For a facial [due process] challenge, the remedy is the striking down of the regulation. In the case of an as applied

challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application."). In contrast, those in line with the decision below view compensation as the exclusive constitutional relief for arbitrary and irrational regulatory action. *See* Pet. App. at A-8 to A-10. Therefore, jurisdiction currently makes a great difference when a landowner has a valid claim that the government has acted illegitimately.

This Court should grant the petition to address the manifest conflict between the lower court's decision to subsume all claims seeking invalidation of arbitrary governmental action within the Takings Clause and this Court's and other circuit courts' long-standing recognition of independent substantive due process protections. *See, e.g.*, *Pearson*, 961 F.2d at 1220 n.45 ("We wish it were within our power to harmonize these decisions [involving substantive due process claims], but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: March, 2003.

Respectfully submitted,

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for *Petitioner*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ESPLANADE PROPERTIES, LLC, a Washington limited liability company, Plaintiff-Appellant	)	**FILED**
v.	)	Oct. 3, 2002
CITY OF SEATTLE, Defendant-Appellee.	)	No. 01-36112
	)	**OPINION**

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff Esplanade Properties, LLC ("Esplanade") challenges the legality of the City of Seattle's ("the City's") denial of its application to develop shoreline property on Elliot Bay in Seattle, Washington. Esplanade contends that the City's action resulted in a complete deprivation of economic use of its property, constituting an inverse condemnation in violation of federal and state constitutional law, and violating both federal and state substantive due process. Specifically, plaintiff appeals three decisions of the district court which, *in toto*, resulted in the dismissal of its claims against the defendant, *to wit*, granting summary judgment to the defendant on plaintiff's takings claim, granting summary judgment to the defendant on plaintiff's federal substantive due process claim, and dismissing plaintiff's state substantive due process claim. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Appendix A–2

I. BACKGROUND

In 1992, Esplanade began a long, and ultimately unsuccessful, process of attempting to secure permission to construct single-family residential housing on and over tidelands located below Magnolia bluff, near both a large city park and a large marina. The property is classified as first class tideland, and is submerged completely for roughly half of the day, during which time it resembles a large sand bar.

Esplanade purchased the property for $40,000 in 1991, and quickly retained a development team to design and secure permits for nine waterfront homes, each to be constructed on platforms supported by pilings. In June of 1992, Esplanade applied for building permits, as well as various use permits, variance permits, and special use permits. None of these applications were ever approved.[1]

After reviewing Esplanade's permit applications, the City's Department of Construction and Land Use ("DCLU") identified three significant code compliance issues related to the proposed project: (1) the size of the proposed piers and docks,

---

[1] Under Washington's Shoreline Management Act ("SMA"), RCW 90.58.010, enacted in 1971, localities are required to develop a set of regulations with respect to their shorelines. Before 1992, under the Seattle Shoreline Master Program ("SSMP"), developed pursuant to the dictates of the SMA, above-water residential construction was seemingly allowed where the lots had less than 30 feet of dry land. Though the Seattle City Council later amended that provision in the SSMP, instead allowing for such use *only* where a lot has at *least* 15 feet of dry land, Esplanade filed its building permit applications before this change took effect, thus vesting its application to the former provision. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782, 786 (Wash. 1986) ("A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.").

(2) the design of the causeway access to the houses, and (3) lack of parking on dry land. The City notified Esplanade of its concerns in a Correction Notice. Esplanade responded to the City's concerns, and sought three formal code interpretations from the DCLU, each relating to the issues raised by the City. Central to the ongoing dispute, the City was asked, *inter alia*, to interpret the code with respect to parking.[2] According to the City's interpretation, parking built over water in a single-family zone was prohibited, despite the general requirement that single-family homes be constructed *with* onsite parking. Esplanade appealed this interpretation, which was eventually affirmed by the Washington Court of Appeals on the ground that residential housing was not a waterdependent or water-related use.

At the end of the appeals process, in November of 1997, Esplanade was informed by the City that it had 60 days to submit formal alterations to its proposed plan, in light of the DCLU's code interpretations, without which the application would be cancelled. [3] Esplanade, instead of altering its parking proposal, simply applied for a variance. Because Esplanade failed to modify its plans with respect to each of the three design concerns raised by the City, on April 13, 1998, the City

---

[2] SSMP prohibits parking above water unless it is accessory to a waterdependent or water-related use. SMC 23.60.092.

[3] After meeting with one of the City's senior land use planners, Esplanade contends that it was given the impression it could satisfy the City's demand to "alter" its application by simply resubmitting the same application along with a request for a parking variance. The City contends that Esplanade had no reason to believe such a submission was adequate, specifically, that *it* never gave Esplanade the impression that it need not address the full panoply of concerns raised by the City with respect to its application.

cancelled Esplanade's application,[4] and later refused to reconsider its unappealable decision.

On June 5, 2000, Esplanade served a letter on the City threatening to make an inverse condemnation claim as a result of the cancellation of its application. Without a response from the City, Esplanade made good on its threat and filed the current action against the City on August 22, 2000.

In its complaint, Esplanade alleges, (1) "inverse condemnation in violation of the federal and state constitutional provisions prohibiting the taking of private property without just compensation," and (2) "violation [of] plaintiff's right to substantive due process, in violation of the state and federal constitutions." Plaintiff seeks "monetary damages" under 42 U.S.C. § 1983 and RCW 64.40.020.

The district court granted the defendant's motion for partial summary judgment, dismissing Esplanade's federal substantive due process claim based upon our holding in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), that federal substantive due process claims are precluded where the alleged violation is addressed by explicit textual provisions of the Constitution, specifically, the Fifth Amendment's "Takings Clause."

The district court, in its Order, did not resolve Esplanade's state substantive due process claim, but requested further briefing from the parties on the question whether the

---

[4] Under SMA 23.76.010(F), "An application shall be deemed abandoned and void if the applicant has failed without reasonable justification to supply all required data within sixty (60) days of a written request for it."

matter should be certified for review by the Washington Supreme Court.

Having received supplemental briefing from the parties, the district court dismissed Esplanade's state substantive due process claim on the ground that Washington state courts had authoritatively held that the Washington Constitution provides no greater substantive due process protection than that afforded by the United States Constitution.

Subsequently, the district court granted the defendant's motion for summary judgment on Esplanade's remaining claim, *to wit*, the City's alleged taking of its property without just compensation, in violation of the Fifth Amendment. The court held that because Esplanade failed to establish that the City's action was the "proximate cause" of its alleged damages, and alternatively, because the "background principles" of Washington state law would have precluded the development, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed.2d 798, 112 S. Ct. 2886 (1992), the City was not liable to Esplanade.

Esplanade appealed, challenging each of the district court's three decisions.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of summary judgment. *Panatronic USA v. AT & T Corp.*, 287 F.3d 840, 843 (9th Cir. 2002).

III. DISCUSSION

We turn first to Esplanade's federal and state substantive due process claims.

A. Federal Substantive Due Process

The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *Armendariz*, 75 F.3d at 1318, we rejected a substantive due process claim brought by plaintiffs (owners of low income housing in San Bernardino) who alleged, *inter alia*, that the City violated their rights by conducting police sweeps resulting in numerous closures of property owned by the plaintiffs. We held that "plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)."[5] *Id.* Because the "Takings Clause 'provides an explicit textual source of constitutional protection' against 'private takings,' the Fifth Amendment (as incorporated by the Fourteenth), 'not the more generalized notion of "substantive due process," must be the guide' in reviewing the plaintiffs' claim of a 'private taking.'" *Armendariz*, 75 F.3d at 1324 (quoting Graham, 490 U.S. at 395).

Esplanade's contention that *Armendariz* is no longer controlling after the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998), is unpersuasive. In that case, a majority of the

---

[5] In *Graham* the Court held that claims of excessive force brought pursuant to 42 U.S.C. § 1983 must be analyzed under the explicit textual sources of constitutional protection found in the Fourth and Eighth Amendments, rather than under the "more subjective standard of substantive due process." *Armendariz*, 75 F.3d at 1319. This rule was reaffirmed in *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (Rehnquist, C.J., for plurality), where the Court required the plaintiff to bring his allegation of criminal prosecution without probable cause under the Fourth Amendment, rather than under the more general protections afforded by the Fourteenth Amendment.

Court held that the Coal Industry Retiree Health and Benefit Act ("Coal Act"), 26 U.S.C. §9701-9722 (1994 ed. and Supp. II), which established a mechanism for providing health benefits to coal industry retirees and their dependents, was unconstitutional. The plaintiff asserted that the Coal Act violated its substantive due process rights and constituted a taking of property in violation of the Fifth Amendment. *Eastern Enters.*, 524 U.S. at 517. Justice O'Connor, writing for four Justices, held that the Coal Act violated the Takings Clause, but explicitly declined to address "Eastern's due process claim." *Id.* at 538. Justice Kennedy, concurring in the judgment, found that the statute should be invalidated based solely upon "essential due process principles, without regard to the Takings Clause of the Fifth Amendment." *Id.* at 539. The remaining Justices found that neither the Takings Clause nor substantive due process was violated by the Coal Act, and none of those Justices analyzed the question under both the Takings Clause and the Fourteenth Amendment.

Eastern Enterprises did nothing to overturn the relevant holding in *Armendariz*. First, of the five Justices constituting the majority, only Justice Kennedy, in concurrence, addressed the due process claim, and he addressed it to the exclusion of the takings claim. The four Justices in dissent decided that the plaintiff had neither a takings claim nor a substantive due process claim. For that reason alone there exists no conflict between the reasoning of the Court in *Eastern Enterprises* and our holding in *Armendariz*. Second, it is beyond cavil that, in our cases decided subsequent to *Eastern Enterprises*, *Armendariz* is treated as controlling precedent. *See, e.g.*, *Weinberg v. Whatcom County*, 241 F.3d 746, 749 (9th Cir. 2001) (dismissing substantive due process claim where takings claim was also filed, and noting, "Under *Armendariz*, the substantive due process claim is properly subsumed by the takings claim."); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999) (with citation to *Armendariz*, holding that "a

plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim.").

Accordingly, we affirm the district court's dismissal of Esplanade's federal substantive due process claim.

B. State Substantive Due Process

Under Washington law, courts consider six factors in determining the propriety of independent examination of a constitutional claim under the Washington Constitution.[6] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (Wash. 1986). The question presented is whether, in applying those factors, we find it appropriate to conduct an independent analysis of plaintiff's substantive due process claims under Washington law.

We agree with the district court that three recent decisions by Washington courts answer the precise question before us. *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473, 486 (Wash. 1996) (Washington Supreme Court declining to make independent inquiry into allegation of state substantive due process violation, since, *inter alia*, "the *Gunwall* factors do not favor an independent inquiry under [the Washington Constitution]. . . . [where] factors (1) and (2) indicate co-extensive state and federal protections, inasmuch as the text of Const. art. I, § 3 and the Fifth and Fourteenth Amendments to the Federal Constitution are identical . . . . [and] factors (3) and (4) similarly indicate no broader protection under the state constitution since this court traditionally has practiced great restraint in expanding state due process beyond federal perimeters.") (internal citations and quotation marks omitted);

---

[6] Those factors are: (1) the textual language; (2) differences in texts; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Gunwall*, 720 P.2d at 812-13.

State v. Burton, 92 Wn. App. 114, 960 P.2d 480, 482 (Wash. Ct. App. 1998) (noting that "the Washington Supreme Court has already established that substantive and procedural due process protections provided by [the Washington Constitution] are not broader than those provided by parallel federal constitutional provisions."); *City of Seattle v. McConahy*, 86 Wn. App. 557, 937 P.2d 1133, 1138 (Wash. Ct. App. 1997) (rejecting argument to "apply a more protective approach [to due process] under the state constitution . . . [where] the [Washington] Supreme Court has held that they are to be interpreted the same way."). These decisions make clear that an independent due process analysis is not called for in this case.

We agree with the district court that the Washington Constitution "is no more solicitous of substantive due process concerns than is the federal constitution." Thus, Esplanade's state due process claim fails as well.

C. Esplanade's Takings Claim

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. This clause prohibits "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)). In addition to instances of physical invasion or confiscation, the Supreme Court has long held that "if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

"Courts have had little success in devising any set formula for determining when government regulation of private

property amounts to a regulatory taking," *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 771-72 (9th Cir. 2000), *affirmed by Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002). However, it is clear that under the "categorical" takings doctrine articulated in *Lucas*, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). Where a regulation "denies all economically beneficial or productive use of land," the multi-factor analysis established in *Penn Central* is not applied, and a compensable taking has occurred *unless* "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. In other words, for a government entity to avoid liability, any "law or decree" depriving the property owner of all economically beneficial use of her property "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

Here, the district court found no taking of plaintiff's property for two reasons. First, the court found that the City's interpretation of the SSMP and its ultimate cancellation of Esplanade's development applications were not the proximate cause of Esplanade's alleged damages. Second, the court found that the background principles of Washington law, specifically the public trust doctrine, burdened plaintiff's property and precluded Esplanade from prevailing in a takings action against the City.

We agree with the district court that under both federal and state law a plaintiff must make a showing of causation

between the government action and the alleged deprivation. *See Tahoe-Sierra* (9th Cir. 2000), 216 F.3d at 783 & n.33 (discussing requirement that "plaintiff [in takings claim] must establish both causation-in-fact and proximate causation," and noting that while "true that there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," despite a passing reference to proximate cause in *Penn Central*, 438 U.S. at 124, "this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking."); *Ventures N.W. Ltd. P'ship v. State*, 81 Wn. App. 353, 914 P.2d 1180, 1187 (Wash. Ct. App. 1996) ("An owner claiming loss of the economically viable use of property must show that the challenged government regulation proximately caused the loss of all such use.") (citing *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176, 127 L. Ed. 2d 563, 114 S. Ct. 1216 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988)). However, because we find that the background principles of Washington state law would have precluded development of the proposed project, and therefore that plaintiff's claimed property right never existed, we do not address the question of causation.

1. Background Principle: Washington's Public Trust Doctrine

As discussed above, a deprivation by the government of all beneficial uses of one's property results in a taking unless, *inter alia*, the "background principles" of state law already serve to deprive the property owner of such uses. *Lucas*, 505 U.S. at 1029. In *Lucas*, subsequent to plaintiff's purchase of two residential lots of shoreline property, the state of South Carolina passed a statute having the "direct effect of barring petitioner from erecting any permanent structures on his two

parcels," rendering them "valueless." 505 U.S. at 1007. In response, the plaintiff sued, alleging that the government effected a complete deprivation of his property. The Court held that "any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," and remanded for a determination of whether such "background principles" would have prevented the proposed use of plaintiff's property. *Id.*, 505 U.S. at 1029.

In this case, the "restrictions that background principles" of Washington law place upon such ownership are found in the public trust doctrine. As the Washington Supreme Court recently explained, the "state's ownership of tidelands and shorelands is comprised of two distinct aspects—the *jus privatum* and the *jus publicum*." *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256, 1262 (Wash. 2000). Relevant here, the "*jus publicum*, or public trust doctrine, is the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'" *Id.* (quoting *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989, 994 (Wash. 1987) (internal quotation marks and citation omitted)). The "doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273, 283 (Wash. 1998), (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)). "The state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'" *Caminiti*, 732 P.2d at 994 (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 36 L. Ed.

1018, 13 S. Ct. 110 (1892)). Instead, the state may only divest itself of interests in the state's waters in a manner that does not substantially impair the public interest. 732 P.2d at 993-95.

It is beyond cavil that "a public trust doctrine has always existed in Washington." *Orion Corp.*, 747 P.2d at 1072 (citing *Caminiti*, 732 P.2d at 994). The doctrine is "partially encapsulated in the language of [Washington's] constitution which reserves state ownership in 'the beds and shores of all navigable waters in the state.'" *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232, 239 (Wash. 1993) (quoting Wash. Const. art. 17, §1). The doctrine is also reflected in Washington's Shoreline Management Act ("SMA"), adopted in 1971. RCW §§ 90.58.010-.930.[7] Following a long history "favoring the sale of tidelands and shorelands," resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state, *Caminiti*, 732 P.2d at 996, the Washington legislature found that the SMA was necessary because "unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest." RCW 90.58.020.

The public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade's property.

We agree with the district court that the Washington Supreme Court's decision in *Orion* controls the outcome of this case, and that Washington's public trust doctrine ran with the

---

[7] The district court erred in stating that "whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine." The doctrine itself is reflected *in* the SMA, but is not superseded *by* it, as made clear by the Washington Supreme Court in *Orion*, 747 P.2d at 1073 n.11 ("We have observed that trust principles are *reflected* in the SMA's underlying policy . . . .) (emphasis added).

title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade.

In *Orion*, the plaintiff corporation, prior to the enactment of the SMA, purchased tideland property in Padilla Bay, the "most diverse, least disturbed, and most biologically productive of all major estuaries on Puget Sound." *Id.*, 747 P.2d at 1065. Orion Corp. proposed dredging and filling of the Bay to create a significant residential community. *Id.* In addressing plaintiff's challenge to subsequent local and state environmental regulations,[8] which it alleged combined to completely deprive it of all economically viable use of its property, the court decided that the tidelands of the Bay were burdened by the public trust doctrine prior to the enactment of the SMA. 747 P.2d at 1072. At the time of Orion's purchase, "Orion could make no use of the tidelands which would substantially impair the [public] trust." 747 P.2d at 1073. Specifically, "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands since a property right must exist before it can be taken, neither the SMA nor the SCSMMP effected a taking . . . ."*Id.* (internal quotation marks and citation omitted).

We find that the development proposed by Esplanade would suffer the same fate under the public trust doctrine as the project proposed by Orion Corp.

Esplanade's argument that *Orion* lacks authority, following the Court's decision in *Lucas*, is without merit.

---

[8] Plaintiff alleged that the SMA and the Skagit County Shoreline Management Master Program (SCSMMP), adopted and approved by the Washington Department of Ecology and designating plaintiff's property as "aquatic," a designation "that foreclosed dredging and filling the tidelands," combined to take its tideland property without just compensation. *Orion*, 747 P.2d at 1066.

Lucas, while articulating an expansive concept of what constitutes a regulatory taking, effectively recognized the public trust doctrine:

> Any [regulation that prohibits all economically beneficial use of land] . . . must in here in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise . . . .The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others.

505 U.S. at 1029 & n.16 (internal citations omitted). *Lucas* does nothing to disturb *Orion's* application of Washington's public trust doctrine.

Esplanade's contention that the proposed development *was* consistent with the SMA at the time his project vested in 1992 is similarly without merit. As the City concedes, at the time of the purchase, the SMA, theoretically, permitted single-family dwellings to be constructed on the property. As the district court noted, however, "there are numerous limitations that the SMA places on developments of shorelines,

even if those developments, like Esplanade's, are not categorically prohibited." (citing, *e.g.*, RCW 90.58.020(2) (requiring that shoreline developments "preserve the natural character of the shoreline"), and RCW 90.58.020(4) (requiring that "projects protect the resources and ecology of the shoreline")). In this case, because Esplanade's tideland property is navigable for the purpose of public recreation (used for fishing and general recreation, including by Tribes), and located just 700 feet from Discovery Park, the development would have interfered with those uses, and thus would have been inconsistent with the public trust doctrine. Therefore, Esplanade's development plans never constituted a legally permissible use.

As the district court correctly noted, "Esplanade . . . took the risk," when it purchased this large tract of tidelands in 1991 for only $40,000, "that, despite extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment. Now, having failed . . . , it seeks indemnity from the City." The takings doctrine does not supply plaintiff with such a right to indemnification.

IV. CONCLUSION

Esplanade's proposal to construct concrete pilings, driveways and houses in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational and other activities, was inconsistent with the public trust that the State of Washington is obligated to protect.

For the reasons given, we affirm.

AFFIRMED.

Appendix B–1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESPLANADE PROPERTIES, LLP,	**FILED** Dec 13, 2002
Plaintiff-Appellant,	No. 01-36112
v.	D.C. No. C-00-1512R
CITY OF SEATTLE,	**ORDER**
Respondent-Appellee.	

Before: B. FLETCHER and GOULD, Circuit Judges, and MURGUIA,[1] District Judge

The panel has unanimously voted to deny the petition for rehearing. Judge Gould voted to deny the petition for rehearing en banc and Judges B. Fletcher and Murguia so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

---

[1] Honorable Mary Murguia, United States District Judge for the District of Arizona, sitting by designation.

Appendix C-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESPLANADE PROPERTIES, LLC, a Washington limited liability company,	)	**FILED**
Plaintiff,	)	Nov. 31, 2001
v.	)	No. C00-1512R
THE CITY OF SEATTLE,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the parties' cross-motions for summary judgment. This is an inverse condemnation action brought by Esplanade Properties, LLC, ("Esplanade")[1] against the City of Seattle ("City"). Esplanade owns platted lots of first class tidelands in Seattle. Beginning in 1992, Esplanade proposed to develop single family residences on those tidelands. Esplanade alleges that the City's cancellation of its permit application in 1998, in addition to its

[1] For simplicity, "Esplanade" refers collectively to Larry Zahnow, the primary party in interest, Tom Simard, who no longer has any ownership interest, Robert Hillstead, a part owner in Esplanade who is now deceased, and Builder's West, the company that purchased the property in 1991 and filed the permit application.

excessive regulations, has left it with no economic use of its property and thus amounts to an inverse condemnation. The City claims that the property has no viable economic use, even without the City's regulations, and that there was no taking by the City.

Having reviewed the pleadings filed in support of and in opposition to the motions, together with the relevant files, and being fully advised, the court finds and rules as follows:

BACKGROUND

Esplanade, successor to a company called Builder's West, bought the property at issue in 1991 for $40,000 and retained a development team. The property is considered part of the Magnolia tidelands, located from West Point on the north to Smith Cove on the south, and west from the foot of Magnolia Hill. The property is submerged in water about twelve hours a day, and when the tide is out, the area resembles a large sand bar. The proposed design would have placed nine waterfront homes on the property. As of June 30, 1992, the property was zoned "SF 7200," or single family residential, medium density.

Before 1992, a provision in the Seattle's Shoreline Master Program ("SSMP"), a set of regulations that the state Shoreline Management Act ("SMA"), RCW 90.58, required local jurisdictions to adopt, seemingly allowed above-water residential construction (the SSMP allowed shoreline residences on lots that had less than 30 feet of dry land). *See* SMC 23.60.365. In July 1992, however, the City Council amended the ordinance to allow residential construction partially or wholly over water only if the lot had at least fifteen feet of dry land.[2] On August 31, 1992, the Seattle City Council passed

---

[2] Esplanade termed this an "emergency ordinance in closed session," while the City claims that the ordinance did not reflect any emergency, but went into effect thirty days after passage, which is

(continued...)

Ordinance 116325 (the "ordinance"), which became effective on February 2, 1993, making the July ordinance permanent. *See* SMC 23.60.360. Esplanade put together building permit applications which were filed before the ordinance took effect.[3]

Having received and reviewed Esplanade's permit applications, on May 19, 1993, the City's Department of Construction and Land Use ("DCLU") provided Esplanade with a list of several aspects of the project that had to be modified in order for the application to proceed. These issues concerned the size of the proposed docks for the houses; the design of the causeway access to the houses; and parking prohibitions. In June 1993, Esplanade submitted responses to the City's request for modification. In its response, some of the corrections were made, some variances were applied for, and three formal code interpretations of particular SSMP provisions were sought. On the issue of parking—the issue most central to this litigation —the City interpreted its code to prohibit parking built over water in a single-family zone,[4] but found also that, generally, single-family homes required on-site parking. Danysh Decl. Ex. A. Esplanade appealed the DCLU interpretations to the City's Hearing Examiner, Superior Court, and ultimately to the Washington Court of Appeals; all upheld City's interpretations.

---

[2] (...continued)
standard for City ordinances. There is no evidence in the record that the sole motivation to pass the ordinance was the proposed development on the Esplanade property.

[3] The City concedes that Esplanade successfully vested his application to the former provision of the SSMP which seemingly allowed over-water residential construction. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) ("A vested right merely establishes the ordinance to which a building permit and subsequent development must comply.").

[4] The SSMP prohibits parking above water unless it is accessory to a water-dependent or water-related use. SMC 23.60.092.

The Court of Appeals held that residential housing is not a water dependent or water-related use, and thus parking could not be permitted above water at the houses. *See* Rosenberger Decl. Ex. 22.

On November 21, 1997, after exhausting its appeals, Esplanade was told by DCLU that it would have 60 days to submit alterations to its proposed building plans that would correct the deficiencies resulting from the code interpretations or else the application would he cancelled. Shortly thereafter, Esplanade's representatives, land use attorney Larry Smith and architect Warren Pollock, met with one of the City's senior land use planners, Mark Johnson. At that meeting, the group discussed the three design issues that Esplanade needed to address—parking, causeway access, and the proposed floating docks. After assuring Johnson that the latter two issues could be resolved by redesign, Esplanade's representatives conveyed that they would be unable to deal with the parking issue without obtaining a variance. Johnson made no promises on whether the City would grant such a variance. There is some dispute between the parties about what was said at this meeting. Johnson insists he did not suggest that Esplanade could only address the parking issue—and ignore the two other deficiencies—in its corrected application. Esplanade claims to have left the meeting believing that, since the parking issue was the most difficult deficiency to correct, it could resubmit its application addressing only the parking issue.

On January 20, 1998, the 60th and final day to submit its alterations, Esplanade submitted a variance application, requesting only the parking variances. On April 13, 1998, the City notified Esplanade that its application had been cancelled because Esplanade had failed to respond to all three of the

design issues.[5] In a June 30, 1998 letter, the City stated it would not reconsider its decision and that the cancellation was unappealable.

On June 5, 2000, Esplanade served a letter to the City notifying the City that it was making an inverse condemnation claim as a result of the City's cancellation of the building permit applications for the nine homes. Having received no response to that letter, Esplanade, on August 22, 2000, filed its complaint in the instant lawsuit.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Genuine issues of material fact that preclude summary judgment are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In deciding a summary judgment motion, the court must view all facts and inferences therefrom in the light most favorable to the non-moving party. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). The "plain language of Rule 56(c) mandates entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

---

[5] The City based its authority to cancel the permit application on language in the Land Use Code. "An application shall be deemed abandoned and void if the applicant has failed without reasonable justification to supply all required data within sixty (60) days of a written request for it." SMC 23.76.010(F). Esplanade resubmitted its application within 60 days, but omitted "all required data."

the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1985).

B. Regulatory Takings

The Takings Clause declares: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Justice Black explained, "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Clause is intended to provide compensation when property is taken through lawful procedures for the benefit of the community. Takings can occur through "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or through a government's entity's exercise of its regulatory police power. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

Esplanade claims that the City's "cancellation" of its building permit applications, together with its unwillingness to reconsider the decision and providing no administrative appeal of the cancellation, has left Esplanade with no economically viable use of its property. Esplanade also claims that the City's interpretations of certain SSMP provisions "effectively prohibited the development" and that the parking regulations "presented an insurmountable obstacle." Pl.'s Br. at 7. These actions, Esplanade contends, amount to a regulatory taking.

The City argues, both in its opposition and in its own summary judgment motion, that Esplanade's project was utterly unfeasible in virtually every respect, and thus the City cannot be blamed for "taking" property of which nothing could be built anyway. Specifically, the City claims that Esplanade had no

money and no chance of shepharding this project through the numerous regulatory hurdles that it faced.

1. Proximate Cause

The City argues that Esplanade cannot show that the City "proximately" caused the alleged damages. Because of the host of seemingly insurmountable hurdles—regulatory, financial, and legal—facing the project, the City contends that Esplanade cannot show proximate causation. In response, Esplanade argues that because the City was the actual body that terminated the development process, the City alone bears responsibility for its alleged damages.

Causation has been recognized as a required element in the takings context. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Aqency*, 216 F.3d 764, 783 (9th Cir. 2000). An owner claiming loss of the economically viable use of property must show that the government regulation proximately caused the loss of all such use. *Ventures Northwest Ltd. P'ship v. State*, 81 Wn. App. 353, 365, 914 P.2d 1180 (1996) ("In a summary judgment proceeding for inverse condemnation, the plaintiff must present evidence that supports at least a reasonable inference that the damage alleged to constitute a taking would not have occurred but for the government conduct at issue . . ."). A determination of proximate cause is generally a question of fact, although with undisputed facts the question may become a determination of law. *France v. Peck*, 71 Wn.2d 592, 430 P.2d 513 (1967).

Even before addressing the feasibility of the project, the issue of causation is problematic for Esplanade. While Esplanade's complaint alleged that the cancellation of the its permit application left it with no economic uses, it has largely abandoned that argument, claiming instead that the parking regulation constituted the taking. *See, e.g.*, Pl.'s Reply Br. at 5. Esplanade complains that "[e]ven if the City allowed revival of [its] application, [it] could never comply with the City's

demand that it include on-site parking for its single family houses built over water, while simultaneously avoiding the construction of parking facilities over water." Pl.'s Mem. in Support of Mot. for Partial Summ. J. at 13. Esplanade seems to ignore the fact that three independent judicial bodies—the City's Hearings Examiner, King County Superior Court, and the Washington Court of Appeals—each upheld the City's interpretations. As such, Esplanade cannot rightly claim that the City is liable because of its reasonable interpretations of the SSMP, which expressly prohibits parking above water unless it is accessory to a water-dependent or water related use.[6] SMC 23.60.092(D).

Turning to the project's feasibility, the court finds that Esplanade cannot show that "but for" the City's action(s) it would have been able to obtain the necessary permits from other regulatory agencies that would have had to approve the project. It is not enough for Esplanade to claim that it cannot presently make economic use of the property, but it must also proffer some evidence that, even if the City had allowed the project to proceed, it could have made economic use of the property. Without such a showing, Esplanade has not demonstrated that any of its proposed uses for the property were "taken" by the City.

The amount of undisputed evidence evincing the utter unfeasibility of this project is impressive. In a December 15, 1992 letter to Mark Johnson of DCLU, the Washington Department of Ecology (DOE), commenting on the Environmental Impact Statement process, wrote, "[DOE] believes [Esplanade's] proposed development does not comply with the use preferences for shorelines of state-wide significance in the [SMA]. The Act gives preference to those

---

[6] Nor can Esplanade claim that the City's SSMP regulations themselves have caused a taking of its property. *See* footnote 11, *infra*.

uses which serve the public interest and which minimize impacts to the shoreline resource (RCW 90.58.020). This project does not appear to provide any overriding public benefit and will cause probable substantial impact to the shoreline environment." Rosenberger Decl. Ex. 12. As to the project's consistency with the SSMP, the DOE concluded that it saw "serious specific problems with the proposal," including the use of the breakwater, the fact that the statute requires structures submerged in right of ways to be floating, and that overwater parking is prohibited by the SSMP and no variance can be granted for a prohibited use. DOE had the discretion to withhold approval of the project, *see* RCW 90.58.140(10), and, in its view, the project violated both the overall policy of the SMA, which DOE is authorized to enforce, and every use preference for shorelines of state-wide significance. *See* Rosenberger Decl. Ex. 12. (concluding that "the project does not meet the [SMA]'s use preferences for shorelines of state-wide significance"). The DOE Shoreline Specialist who authored the letter has submitted a declaration, confirming that, whether or not the project was altered to satisfy the City's review process, the DOE would still not have issued a permit for the project. Hegy Decl. ¶ 4 ("[A]s long as the principal purpose of the project, residential housing over water, . . . [the] project would not satisfy the use preferences for shorelines of state-wide significance."). Other authorities on shoreline development in the state confirm that the project was incurably in conflict with the fundamental policies and regulations of the SMA. *See* Weinman Decl.; Buck. Decl.

The DOE was not the only regulatory agency that would have needed to approve the development proposal. Others included the State Shorelines Hearings Board, the State Department of Fish and Wildlife, the United States Coast Guard, the Army Corps of Engineers and two Indian Tribes. The Army Corps' of Engineers would require that the project go through an "alternatives analysis," and the Corp's

environmental analyst concluded that, because of issues related to the Endangered Species Act, the Clean Water Act, and the Rivers and Harbors Act, "it would have been very difficult for them to get through the permit process." Terzi. Decl. ¶ 6. But the Corps' permit could not even be issued without tribal approval, which was never obtained. In fact, two Indian tribes who exercise treaty rights to fish in the vicinity of the proposed construction submitted letters to the DCLU expressing concern about the project and advising the City of their rights. Rosenberger Decl. Ex. 31, 32.

That Esplanade could not have financed the project is also amply supported. Esplanade's architecture firm projected the cost of the EIS alone to be over $1 million. Rosenberger Decl. Ex. 15. The EIS was never completed. Zahnow admitted in his deposition that he did not have the money to do the EIS, which would have been required before permits would be issued by either local, state or federal agencies. Zahnow Dep. at 84. The unrebutted evidence also shows that there were no investors and no financing for the project and that, even assuming the project could have been completed, its cost would have far exceeded what it would have recovered in sales. Gibbons Decl. Ex. 1.

In the face of this extensive evidence, Esplanade has proffered little evidence—other than its own team members' beliefs—of the project's feasibility.[7] Its only response has been

---

[7] Esplanade has in fact conceded that the project was not feasible. In its complaint filed against its previous attorneys, Esplanade alleged that they had committed malpractice because the attorneys "not only failed to tell [Esplanade] that the project plans . . . were not in conformance with the code, but represented to the contrary at various times that the project had no 'fatal flaws .' . . . The project design did accordingly have 'fatal flaws' in that the proposed residences could not have

(continued...)

that these feasibility issues are irrelevant to the determination of liability. The court disagrees. The feasibility of a proposed development is indeed a factor to consider in determining the fair market value of the property after liability has been established. *See United States v. 62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992). However, Esplanade has failed to establish an essential element of takings liability. Esplanade has not shown that the City's cancellation of the permit application—or its interpretation of the SSMP—was the cause in fact of the purported loss of all reasonable use. Accordingly, Esplanade is not entitled to partial summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (holding that Rule 56(c) mandates the entry of summary judgment against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case).

2. The Public Trust Doctrine and "Background Principles" of Washington Law

An alternative basis exists for denying Esplanade's takings claim: "background principles" of Washington law—specifically, the public trust doctrine—would have precluded the development, and therefore the City cannot be liable for taking a property right that did not exist.

a. *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court required that if a property owner is subject to a complete deprivation of value, the restriction may not be a novel extension of a valid theory, but must result from restrictions that "background principles" of the state's law of property and nuisance already place upon land ownership. In *Lucas*, the Beachfront Management Act in South

---

[7] (...continued)
garages, and the proposed causeway and floating docks could not be built." Rosenberger Decl. Ex. 23, ¶ 20.

Carolina created a "dead zone" along the shore in which the construction of residences was precluded. At the time Lucas purchased the lots there were no governmental restrictions that would bar the lots from their intended purpose. The subsequent restrictions, however, precluded all construction except for such things as small wooden decks and walkways. Lucas brought an inverse condemnation claim against the South Carolina Coastal Council claiming that the new regulation deprived him of all "economically viable use" of his property and therefore effected a taking.

The Court noted that while it generally had applied the *Penn Central*[8] ad hoc balancing test to regulatory takings, it had found "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of the land." *Id.* at 1015 (quoting *Agins v. Tiburon*, 447 U.S. 255 (1980)). The Court stated that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. The court went on to say that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership." *Id.* at 1029. The Court ultimately remanded the case to determine whether common-law "background

---

[8] Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, determining whether a taking has occurred depends on factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)

principles" would have prevented the erection of any habitable or productive improvements on Lucas's land.

Esplanade argues that there are no "background principles" of Washington law that would have foreclosed developing its property. The City responds by arguing that the "public trust" doctrine and the SMA are two "background principles" that preclude this type of development. Esplanade, therefore, never had the right to develop its property in this manner.

b. The Public Trust Doctrine

The "public trust" doctrine provides that certain natural resources, particularly the ocean and shoreline, and navigable waters and their shores, are deemed the common property of mankind and are available for use by the people. *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987). The doctrine "prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired . . . ." *Weden v. San Juan County*, 135 Wn.2d 678, 698-99, 958 P.2d 273 (1998). In *Wilbour v. Gallagher*, the Washington Supreme Court explained, "the public has the right to go where the navigable waters go, even though the navigable waters lie over private owned land." 77 Wn.2d 306, 315-16, 462 P.2d 232 (1970).

The public trust doctrine burdens Esplanade's tidelands. *See Orion Corp. v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987) (noting that the public trust doctrine has always existed in Washington and that it applies to the state's tidelands). Esplanade proffers two reasons, however, why the "public trust" doctrine does not bar its proposed use of the property. First, Esplanade argues that Washington law has "traditionally

encouraged" the development of first class tidelands.[9] Esplanade points to the first Washington legislature's requiring first class tidelands to be platted, appraised, and made available for private sale, 1889-90 Wash. Laws 431-37, as evidence that "background principles" of Washington do not preclude development of Esplanade's property.

Second, Esplanade points to *Caminiti*, in which the Washington Supreme Court stated that "the requirements of the public trust doctrine" are fully met by the legislatively drawn controls imposed by the [SMA]." 107 Wn.2d at 770. Esplanade argues that, at the time the project vested in 1992, the SMA, codified in the SSMP, defined the property as a "Conservancy Recreation Environment" ("CR"). SMC 23.60.360. Under this code section, which overlays the existing city zoning code of SF 7200 (single family residential, medium-density), single family housing was the only permissible use on the property.

i. The SMA is the relevant "background principle" of Washington law

Esplanade argues that the more modern treatment of tidelands and other environmental protections cannot be considered part of the state's historical treatment of these areas and thus cannot be considered a "background principle" under *Lucas*, sufficient to preclude liability for a taking. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2464, 2448 (2001) ("background principles" are "those common shared understandings derived from a State's legal tradition"). Thus, according to Esplanade, "[a]pplying the public trust doctrine to preclude all viable economic use of [its] property would constitute a wholesale change in Washington's traditional

---

[9] First class tidelands are distinguished from second and third class tidelands by their location and the state's historic policy toward those tidelands. *Compare* RCW 79.01.020 *with* RCW 79.01.024.

conception of the rights held by owners of first class tidelands." Pl.'s Reply at 11. The court disagrees.

Following the enactment of the SMA in 1971, Washington changed its policies with respect to tidelands.[10] The state legislature found that the SMA was needed because "unrestricted construction on the privately owned or public owned shorelines of the states is not in the best public interest, and therefore, coordinated planning is necessary in order to protect the public interest . . ." RCW 90.58.020. Therefore, the SMA was designed to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." *Id.* That the SMA changed the state's regarding the development of tidelands is evident in a number of ways. The *Harris* court noted, for example, "Until 1971, Washington had a liberal policy favoring the sale of tidelands and shorelands. [The SMA] now prohibits all such sales except for limited sales of certain second class shorelands of navigable lakes." 81 Wn.2d at 673 n.25. Washington courts have, accordingly, recognized that whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine. *See Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979). Thus, the

---

[10] The SMA provides in part:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

century-old historical treatment tidelands, on which Esplanade relies, is no longer the relevant "background principle" of Washington law.

Esplanade's historical arguments would be more germane had it bought the property before 1971 and was challenging the effects of the SMA itself.[11] Such a scenario would have made it analogous with the facts of *Lucas*. But a crucial difference between *Lucas* and this case is that *Lucas* was challenging a new statute which, he alleged, deprived him of reasonable use of his property. The Supreme Court therefore addressed whether "background principles" of South Carolina property law would have precluded the uses anyway. These are not the facts presently before the court. Esplanade purchased the property in 1991, not 1891, and was thus subject to the limitations imposed by the public trust doctrine as codified in the SMA.[12]

---

[11] The enactment of the SMA and the SSMP, as a matter of law, could not have amounted to a taking of Esplanade's property. As *Orion* demonstrates, a property owner cannot sue for a taking as a result of SMA or the SSMP (or, in *Orion*, the SCSMMP). *See Orion*, 109 Wn.2d at 660 (explaining that since the statutes "qualified as a public health and safety regulation, [they are] insulated from characterization as a taking, and thus subject to challenge only under substantive due process").

[12] That Esplanade bought the property with knowledge of the limitations imposed by the SMA does not, without more, preclude its takings claim. The court is aware of the Supreme Court's recent decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), in which the Court stated that post-enactment purchasers do not forfeit a takings challenge simply because they are deemed to have notice of the regulations. The Court wrote that if it were "to accept [such a] rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 2462-63. In other words, whether

(continued...)

ii. Substantial impairment of the public trust

Having determined that the relevant "background principles" of state law are those embodied in the SMA, the next task is to determine whether in fact those principles would have precluded the Esplanade development.

The court is persuaded that *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), controls the outcome here. In *Orion*, the Washington Supreme Court applied the public trust doctrine to similar facts and held that the doctrine would have precluded residential development in Orion's tidelands. Thus, because the tidelands were always burdened by the public trust, the regulations imposed by the SMA and the Skagit County Shoreline Management Master Program (SCSMMP), did not amount to a taking of the property.[13]

Esplanade argues that, because *Orion* was decided before *Lucas*, the *Orion* court's decision applying the public trust doctrine to impair development of the state's tidelands is no

---

[12] (...continued)
a purchaser bought his property before or after the enactment of the SMA in 1971, *Palazzolo* does not insulate the state from any takings claim that might arise as a result of the SMA. However, that Esplanade bought the property in 1991 does not exempt it from the limitations of the SMA. Neither *Lucas* nor *Palazzolo* require this court to ignore the SMA and consider the state's treatment of tidelands at the turn of the century to be the relevant "background principles."

[13] The *Orion* court concluded that Orion's property, which it purchased before the enactment of the SMA, was nonetheless burdened by the public trust doctrine, as that doctrine had always existed in Washington. However, in determining whether Orion's proposed development was consistent with the public trust, the court used the SMA as the relevant yardstick. *See* 109 Wn.2d at 641. Thus, despite the fact that Orion challenged the SMA itself, the analysis of the *Orion* court is highly apposite to the instant matter.

longer good law.[14] The court disagrees. That Orion was decided before *Lucas* does not diminish its value regarding the scope of the public trust doctrine in Washington.

While there is not the broad, absolute prohibition on developing first class tidelands that the City suggests, the public trust doctrine, as codified in the SMA, nonetheless imposes substantial limitations on the development of tidelands. *See Weden v. San Juan County*, 135 Wn.2d 678, 698-99, 958 P.2d 273 (1998) (stating that the public trust doctrine "'prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired . . . .'"). Moreover, the public trust doctrine extends "beyond navigational and commercial fishing rights to include "incidental rights of fishing, boating, swimming, water skiing,

---

[14] In another attempt to distinguish *Orion*, Esplanade argues that there is a crucial distinction between *Orion* and this case: *Orion* involved second-class tidelands which have traditionally been more protected than the first class tidelands like those at issue here. The public trust, Esplanade argues, has never represented a bar to development of first class tidelands or mandated those tidelands remain economically idle. However, the *Orion* court, rejecting a similar argument, never suggested that its holding turned on which class of navigable tidelands the proposed development was located. *See* 109 Wn.2d at 639-40.

Esplanade also points out that in *Harris v. Hybelos Industries*, the Washington Supreme Court noted that "the legislature has regarded the filling and improving of first class tidelands particularly in commercial harbors, as an aid to navigation, rather than an obstruction." 81 Wn.2d 770, 778, 505 P.2d 457 (1973). The pronouncements of the *Harris* court, on which Esplanade relies so heavily, are dictum and moreover do not seem entirely consistent with the later holdings of that Court, especially *Wilbour*, *Caminiti*, and *Orion*. The *Wilbour* court, moreover, distinguished *Harris* by noting that the tidelands in *Harris* were dedicated to heavy industry and that there was no showing that the public had any access to those tidelands. That distinction is equally relevant here.

and other related recreational purposes . . ." *Orion*, 109 Wn.2d at 641 (quoting *Wilbour*, 77 Wn.2d at 316).

Esplanade contends that its proposed use is consistent with the SMA because, at the time its project vested in 1992, the SMA actually permitted single-family dwellings to be built on the property. Pl.'s Mem. in Supp. of Mot. for Partial Summ. Judg. at 16. Assuming the SMA and SSMP generally permitted single family residences to be built on Esplanade's property, this fact alone is not enough to show that the controls of the public trust doctrine and the SMA were met. There are numerous limitations that the SMA places on developments of shorelines, even if those developments, like Esplanade's, are not categorically prohibited. *See, e.g.*, RCW 90.58.020(2) (requiring that shoreline developments preserve the natural character of the shoreline); RCW 90.58.020(4) (requiring that projects protect shoreline resources). That the SMA might have permitted certain single family residences to be built on this category of property is, without more, insufficient to establish that Esplanade's proposed use is consistent with the SMA.[15] Indeed, the undisputed evidence tends to show just the opposite.

Like Orion's, Esplanade's tidelands are navigable for the purposes of public recreation. It is undisputed that the property consists of land waterward of the mean higher high water mark (the average, over time, of the highest tide each day); the Esplanade property is therefore navigable during high tides. The City has also proffered unrebutted evidence that the Esplanade property is used for fishing and recreation. The project site is just 700 feet south of Discovery Park and would

---

[15] Furthermore, it is not enough for Esplanade to claim that its proposed uses were merely permissible. There is an additional requirement that, before a property owner can recover for a regulatory taking, he must also show that the proposed use would be reasonably profitable. *See Orion*, 109 Wn.2d at 660. Esplanade has not made such a showing.

impact this recreational asset. Rosenberger Decl. Ex. 13 at 3. Comment letters attested to the regular use of the property for boating and recreation. Id. Exs. 37-39. Native Americans use the area for fishing. *See Muckleshoot Indian Tribe & Suquamish Indian Tribe v. Hall*, 698 F. Supp. 1504, 1505 (W.D. Wash. 1988). Undoubtedly the project would have interfered with these uses—it would have required concrete pilings, topped by roads and houses. Moreover, Esplanade's structures would have covered 160,000 square feet of "shoreline of state-wide significance." Gross Decl. Ex. 1.[16] As such, Esplanade's tidelands are subject to even more substantial state planning authority than would be other shorelines under the SMA. *See Beuchel v. State Dept. of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994).

The *Orion* court concluded that "[s]ince a 'property right must exist before it can be taken,' neither the SMA nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill project." *Id.* at 642 (citations omitted). Similarly, because Esplanade's proposed project would have interfered with such incidental and recreational uses as "fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Wilbour*, 77 Wn.2d at 316. As such, this case fits squarely within *Orion*—that residential development on navigable tidelands used for public recreation is inconsistent with the public trust doctrine. Therefore, because of the limitations imposed by the public trust doctrine and the SMA, Esplanade's development plans never constituted a legally permissible use.

---

[16] Since the project proposes to extend below the line of extreme low tide, it would therefore occur within a "shoreline of statewide significance." RCW 90.58.030(2)(e); Rosenberger Decl. Ex. 12.

CONCLUSION

This court finds that Esplanade was aware when it acquired the property of the countervailing considerations and concerns regarding shoreline development in Washington. In fact, when it purchased this large tract of shoreline in 1991 for only $40,000, Esplanade acknowledged that the property "was considered of little value and non-buildable by the owner." Rosenberger Decl. Ex. 1. Esplanade therefore took the risk that, despite the extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment. Now, having failed to consummate the development, it seeks indemnity from the City. For the foregoing reasons, the court finds that such a remedy is unwarranted.

Therefore, the court hereby GRANTS defendant's motion for summary judgment [docket no. 74-1] and DENIES plaintiff's motion for partial summary judgment [docket no. 50-1]. Plaintiff's Motion for a Continuance [docket no. 77-1] and defendant's Motion to Strike the Cost Estimate of Roger Mebust [docket no. 63-1] are hereby STRICKEN as moot.

DATED at Seattle, Washington this 31st day of October, 2001.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT
JUDGE

Appendix D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESPLANADE PROPERTIES, LLC, a Washington limited liability company,	)	**FILED**
	)	No. C00-1512R
Plaintiff,	)	MAY 9, 2001
v.	)	ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
THE CITY OF SEATTLE,	)	
Defendant.	)	

THIS MATTER comes before the court on defendant City of Seattle's motion for summary judgment. Having considered all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

In June 1992, plaintiff Esplanade Properties, LCC ("Esplanade") applied for building permits to develop waterfront property located on Elliott Bay in the city of Seattle. Esplanade planned to construct nine single-family residences on this property. Because the property is partially submerged for part of each day, Esplanade planned to build the homes on platforms supported by pilings. In addition to the building permits, Esplanade also applied for various street use permits, variance permits, and special use permits so that it could construct streets, utility lines, a breakwater for shielding the residences, and various other structures. Defendant City of Seattle ("the City") has not yet granted any of these permits.

During the early stages of review, the City identified three significant code compliance issues related to the project, including problems with the design of a proposed elevated causeway structure, the size of proposed piers and docks, and the location of proposed parking areas. The City notified Esplanade of these issues in a Correction Notice, which issued in January 1993. Eventually, Esplanade requested that the City's Department of Design, Construction and Land Use ("DCLU") issue formal land use code interpretations covering the three disputed issues. The DCLU Hearing Examiner's interpretations were, ultimately, not favorable to Esplanade. The interpretations survived review up through the Washington Supreme Court, which denied discretionary review.

Following the end of the litigation relating to the code interpretations, the City informed Esplanade in a November 21, 1997 letter that it needed to revise its plans by January 20, 1998, in order to avoid cancellation of the project. In response, Esplanade submitted an application for a parking variance. The City cancelled the project on April 13, 1998. Esplanade sought administrative review, which the City denied.

Esplanade subsequently filed this action against the City, alleging inverse condemnation under the federal and state constitutions, violations of substantive due process, and violations of 42 U.S.C. § 1983 and RCW 64.40. The City moves for partial summary judgment dismissing Esplanade's substantive due process claims and its RCW 64.40 claim. In its response to the City's motion for partial summary judgment, Esplanade concedes that its Chapter 64.40 claim is time barred. Thus, the only issues now before the court relate to Esplanade's state and federal substantive due process claims.

II. DISCUSSION

A. Summary Judgment Standard

The Federal Rules of Civil Procedure provide that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Federal Substantive Due Process Claim

As its first cause of action, Esplanade alleges that the City's conduct resulted in an inverse condemnation in violation of the Fifth Amendment takings clause[1] and the Washington State constitutional provision prohibiting the taking of private property without just compensation. *See* U.S. Const. amend. V; Wash. Const. Art. I, § 16. Esplanade also alleged, as a second cause of action, that the City violated its right to substantive due process by arbitrarily and capriciously cancelling its project application and eliminating all reasonable economic use of the land.

The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Although the due process clause confers both procedural and substantive rights, Esplanade alleges only violations of substantive due process. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

Substantive due process protection, however, is not without limits. In *Armendariz*, the Ninth Circuit rejected the landowners' substantive due process claim because the claim

---

[1] The United States Constitution's takings clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

challenged conduct otherwise addressed by the Fifth Amendment's takings clause. *Id.* at 1328. The landowners' substantive due process claim in *Armendariz* alleged that "the city's invocation of its emergency powers to close down [the landowners'] properties when no real emergency existed, along with other actions by the city . . . was arbitrary and capricious, and violated [the landowners'] Fourteenth Amendment right to substantive due process." *Id.* at 1315. The court found that the Fifth Amendment's takings clause provided limitations for the property-depriving conduct asserted in the landowners' substantive due process claim. *Id.* at 1321. Accordingly, the court held that the landowners' substantive due process claim was precluded, articulating that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* at 1325-26.

The language and substance of Esplanade's substantive due process claim is similar to the claim asserted in *Armendariz*. In its claim, Esplanade alleges that the City's actions resulted in a deprivation of property without compensation. Thus, just like the government's conduct in *Armendariz*, the City's conduct that Esplanade complains of, i.e, deprivation of property, falls within the scope of the Fifth Amendment's takings clause. Esplanade contends that the rule in *Armendariz* does not bar its "arbitrary and irrational" substantive due process claim. However, a plaintiff cannot "sidestep *Armendariz* by re-characterizing [its] claim as lying solely in substantive due process." *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997). This rule holds especially true here, where Esplanade makes no attempt to request either injunctive or declaratory relief—the standard relief associated with "arbitrary and capricious" type substantive due process claims. *See Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990) (noting that relief for substantive due process claims

in land use context is either a striking down of the regulation or an injunction preventing the unconstitutional application of the regulation). Thus, because the Fifth Amendment offers explicit protection against the type of governmental conduct alleged in this case, under *Armendariz*, "the claim must be analyzed under [the takings clause] alone, and not under the mere general guarantee of substantive due process." *Macri*, 126 F.3d at 1128 (citing *Armendariz*, 75 F.3d at 325-26).

C. State Substantive Due Process Claim

Esplanade presents two arguments as to why it should be allowed to proceed with its state substantive due process claim. First, Esplanade argues that the Washington Supreme Court has allowed substantive due process claims to proceed in factually similar land use cases, including the post-*Armendariz* decision in *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947 (1998). Second, Esplanade argues that, under the analysis provided in *State v. Gunwall*, 106 Wn.2d 54 (1986), its state claim stands because the Washington Constitution extends broader rights to its citizens than the United States Constitution.

This case turns exclusively on the issue raised in Esplanade's second argument. The Ninth Circuit has recently indicated that, in a case where *Armendariz* applies to bar a federal due process claim, the viability of a land use plaintiff's state due process claim turns entirely on the issue of "whether the Washington Constitution provides greater substantive due process protection than the United States Constitution." *Buckles v. King*, 191 F.3d 1127, 1138 (9th Cir. 1999) (rejecting plaintiff's argument that *Mission Springs* controlled). The *Buckles* court, however, never reached the constitutional protection issue because the parties failed to "argue and brief the six factors laid out by the Washington Supreme Court for determining whether the Washington Constitution provides broader rights than the United States Constitution." *Id.* (citing *Gunwall*, 106 Wn.2d 54).

Here, both parties have argued and briefed the six *Gunwall* factors. However, because this issue may best be suited for certification by the Washington Supreme Court pursuant to RCW 2.60, the court declines to conduct a *Gunwall* analysis at this time.

CONCLUSION

For the foregoing reasons, the court GRANTS IN PART defendant's motion for partial summary judgment. Plaintiff's federal substantive due process claim and its RCW 64.40 claims are dismissed. Additionally, the court orders that both parties submit memoranda on the issue of whether the state law question should be certified for review by the Washington Supreme Court, pursuant to RCW 2.60. Said memoranda shall not exceed five pages and shall be submitted to the court no later than May 19, 2001.

DATED at Seattle, Washington this 8th day of May, 2001.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

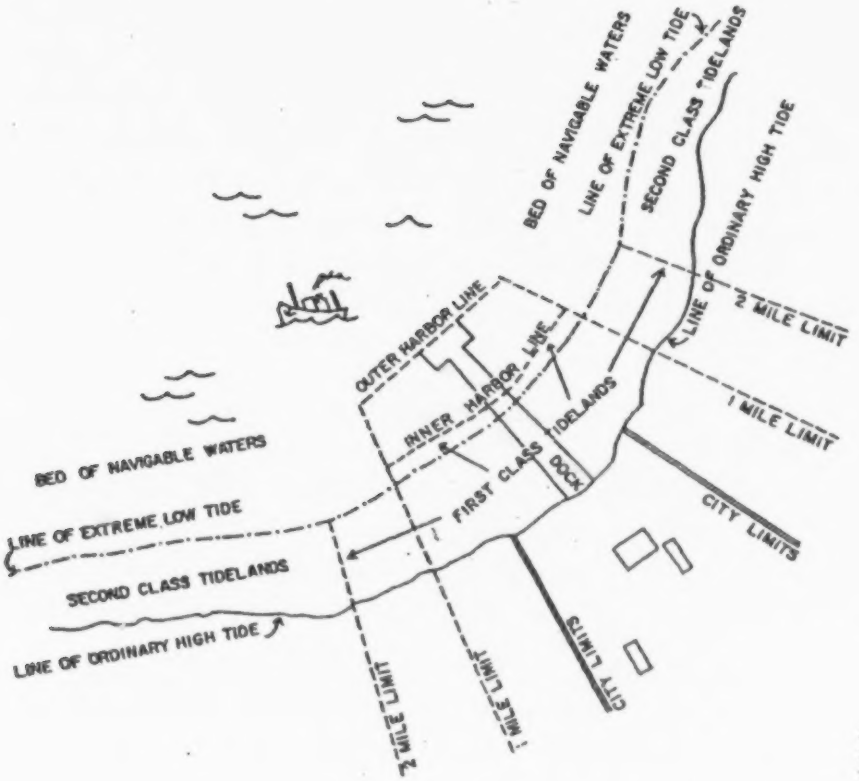
Appendix E-1

HARBOUR LINES AND THE PUBLIC TRUST DOCTRINE IN WASHINGTON NAVIGABLE WATERS

* * *

Harbour Lines

FIGURE 1
SCHEMATIC DIAGRAM OF
HARBOR LINES AND TIDELANDS



Appendix F-1

THE DISPOSITION OF TIDELANDS AND SHORELANDS

WASHINGTON STATE POLICY

1889-1982

Kenan R. Conte

November 1982

Appendix F-2

* * *

WASHINGTON STATE

1889-1927

Tideland and Shoreland Sales Policies-The First Legislature, 1889-1890.

The first Legislature of the State of Washington convened in late 1889. Before adjourning, this Legislature would establish sales policies with far reaching effects on tidelands and shorelands for many years to follow.

The same interests were represented in the 1889-1890 Legislature as were at the Convention. In fact, some of the Convention delegates actually returned as legislators. Loyalties changed significantly, however, when a group of Eastern Washington legislators recommended that tidelands be sold at public auction with no preference rights to purchase. This was all that was required for the abutting land owners and the owners of improvements, both of whom wanted a preference right to purchase, to join forces (Nesbit, 1961, p 317, 318). The outcome of the first legislative session indicates, in part, the strength of their lobby.

The 1890 Legislature approved an act entitled: "Tide And Shore Lands; Appraisement And Disposal Of" (*Laws of Washington*, 1890). Section One of this act stated that "the tide and shore lands in the State of Washington shall be appraised, and the same shall be disposed of by the Commissioner of Public Lands as in this act provided."

Three bodies were established to deal with the sale of tidelands and shorelands: 1) The Board of Appraisers were to plat and appraise tidelands and shorelands, 2) The Commissioner of Public Lands was to conduct the sale, and 3) The Board of Equalization was to help administer the land (Sections 1-3).

In Section 4, the Legislature set about dividing tidelands into three classes:

1. First class tidelands were those in front of or within two miles on either side of a city.

2. Second class tidelands were those which were greater than two miles from a city and which had improvements on them

3. Third class tidelands were all others not falling in the above categories.

Section 4 went on to stipulate that the first class tidelands were to be surveyed and appraised as soon as possible. Second class tidelands were to be surveyed and appraised if someone owing improvements on them applied to purchase them. Finally, third class tidelands were to be surveyed and appraised if someone owning improvements on them applied to purchase them. Finally, third class tidelands were to be surveyed and appraised if the applicant would deposit a sum of money sufficient to cover the costs of doing so.

Section 8 required a three week public notice of the application so that anyone who desired could contest the sale.

Section 11 established one of the more interesting policies concerning tidelands and shorelands although, as will be discussed shortly, it is unclear that this act applied to shorelands. This section gave the owners of improvements a sixty day preference period to purchase the tidelands which they occupied. If they failed to purchase, then the abutting upland owner would have the next preference right to purchase. Finally, if the people with preference rights did not purchase the tidelands, then Section 13 allowed for their sale to the public by sealed bid.

A number of comments should be made concerning this first legislative act allowing for the sale of tidelands and,

possibly, shorelands. While the first several Legislatures were at times unclear and inconsistent in their policies concerning these lands, there is little question that the 1890 Act set the tone of tideland and shoreland policy for many years to come.

The key policy set forth by the 1890 Legislature is, of course, the simple fact that they decided to sell public tidelands and shorelands into private ownership. It is clear that this policy revolved around the strong lobby put forth by the owners of improvements on tidelands as well as the owners of uplands abutting the tidelands, both development oriented interests. This is most easily noted by two aspects of the 1890 legislation. The first aspect was the priority given to the sale of each class of tideland, and the second was the preference right to purchase which was awarded to certain individuals. In terms of priority, first class tidelands (in front of or within two miles of a city) were to receive the most immediate attention. They were to be surveyed and appraised immediately, presumably at the State's expense. These tidelands were, of course, the centers of development and commerce which were central to the controversy which had raged for some years. Second class tidelands (greater than two miles from a city and with improvements) were to be surveyed and appraised upon request, and again, at the State's expense. These lands were probably not centers of controversy, but were important to the owners of the improvements in question. Finally, third class tidelands held no improvements and they were to be surveyed and appraised upon request and at the expense of the applicants. The second aspect of the legislation which indicates the strength of the lobby involved is the preference clause. The owners of improvements, the chief lobbyists at both the Constitutional Convention and the first Legislative Session, were given the first preference to purchase the tidelands they occupied. The abutting upland owners (riparian owners) were given the second preference right to purchase. This is particularly significant in view of Articles XVII and XXVII of

the *Constitution*. While these articles clearly deny special constitutional rights to riparian owners, the 1890 act of the Legislature established, by virtue of the preference clause, special rights to these individuals to purchase tidelands and shorelands. The owners of improvements were not riparian owners; however, they too were granted special rights above and beyond those rights afforded the general public.

A more subtle, but still important, provision of the 1890 act is found in Section 13. This section allowed tidelands to be sold to the public by sealed bid if the preference rights were not exercised. This provision indicates that the Legislature was not simply accommodating a strong lobby but was, in fact, adopting a more general pro-sales policy, one which would facilitate the growth and development which the State depended upon.

* * *

The Establishment of Harbor Areas - The Harbor Line Commission.

The 1890 Legislature approved two acts concerning harbor areas. The first, titled "Harbor Line Commissioners" established the Harbor Line Commission and instructed it to set harbor lines as per the Constitution. The second, titled "Public Ways Across Tide Flats Near Towns" instructed the Commission to establish "public ways" of fifty to one thousand feet in width across tidelands (Laws of Washington, 1890). The latter act is of particular interest in that it represents one of the earliest legislative acts designed to protect public use of and access to the industrially oriented harbors.

The *First Report of the Harbor Line Commission of the State of Washington* (1891), contains a detailed report of the Commission's activities. This report explains that the Harbor Line Commission first met in Seattle on July 25, 1890. They decided to begin their work there "on account of the number, value, and extent of its commercial interests, as well as its

aggregate of business and population" (p 9). Realizing that the tidelands could not be sold until the harbor lines were established, the commissioners went on to comment:

> large numbers of men were then and are still waiting for an opportunity to acquire title of these tide flats, in order that they may establish thereon various industrial and manufacturing enterprises of great importance to the city and state (p 9).

Presumably the commissioners were referring to those tidelands greater than six hundred feet landward of the inner harbor line.

As reported in the *First Report of the Harbor Line Commission of the State of Washington* (1891), the Commission went into great detail determining how to go about its tasks, including investigating how harbors were established in London, Liverpool, Boston, New Jersey, Maryland, Virginia, New York City, California, and San Francisco. Based upon their investigations, the Commission decided to establish two harbor lines: an outer harbor line and an inner harbor line. The outer harbor line was established in Elliot Bay (Seattle) in water fifty feet deep at low water. The inner harbor line was established six hundred feet landward of the outer harbor line (the maximum allowed in the *Constitution*) which put it at a "median distance between high and low water" (p 26). The area beyond the outer line as well as the area between the two lines ("the harbor area") was, of course, reserved from sale by the *Constitution*.

As established, the inner harbor line cut through two miles of Railroad Avenue and thirty-five wharves (p 26). The owners of these improvements had lobbied considerably with the Commission, as they had at the Constitutional Convention, to set the lines further off shore. In fact, they wanted the inner harbor line rather than the outer harbor line set in a minimum

of fifty feet of water at low tide (p 13). Their motives did not escape the Harbor Line Commissioners who stated:

> the object of the [owners] proposition was to place the inner line beyond any wharves or other structures upon the present line of deep water and virtually leave the entire control of the commerce of the city in the hands of those who now occupy the water front (p 13).

The Harbor Line Commissioners went on to express their view of the developers' proposal:

> The utter absurdity of the proposition advanced and strenuously supported by those parties must be apparent to every intelligent man who gives the subject proper consideration (p 13).

Opponents of the Harbor Line Commission immediately obtained an injunction prohibiting any further action. Filed in the King County Superior Court of Judge J.I. Litchenberg, the case of *Yesler v. The Harbor Line Commission* (1891) was the first of several suits filed against the Commission. Nesbit (1961) points out that while the Harbor Line Commission lost the case in Judge Litchenberg's court, it won, on July 5, 1981, an appeal to the State Supreme Court (*Harbor Line Commissioners v. State*, 1891). The State Supreme Court opinion was written by Justice Hoyt who, in 1889, had been the president of the Constitutional Convention (p. 332, 333). The case was then appealed to the U.S. Supreme Court where it was eventually dismissed (*Yesler v. The Harbor Line Commission*, 1892).[1]

Due to much litigation and maneuvering by tideland developers, the Seattle harbor lines were not established prior to the

---

[1] Today, *Yesler v. The Harbor Line Commission* is regarded as one of several court cases which confirm the nonriparian nature of Washington State.

dissolution of the Harbor Line Commission in January 1893. That task then fell upon the Board of State Land Commissioners who, according to Nesbit (1961), established the lines in a manner more palatable to the development interests (p 339).

* * *

Tideland and Shoreland Sales Policies - The 1895 Legislature.

The 1895 Legislature left the basic policies concerning the disposition of tidelands and shorelands intact. However, there were some changes worthy of mention. For example, the Legislature turned the responsibilities of the Board of Appraisers and the Board of Equalization over to the Board of State Land Commissioners (*Laws of Washington*, 1895, Section 53). In addition, tidelands and shorelands were, for the most part, dealt with in separate sections. This adds weight to the suggestion that even then the former referred to tidal water while the latter referred to non-tidal waters.

In the *Laws of Washington*, 1895, tidelands were dealt with in Sections 52, 53, 54, 61, 62, 65, 66, 70 and 72. The significant changes from the 1890 laws are discussed below.

Where in 1890, tidelands and shorelands were divided into classes in the same section, they were divided separately in 1895. Section 52 described first class tidelands as those in front of or within two miles of a city. In addition, tidelands and portions of bedlands lying between the "line of mean low tide and the inner harbor line," where harbor lines were established, were also classified as first class tidelands. Second class tidelands were then defined as those having valuable improvements on them on or prior to March 26, 1890. Third class tidelands were all those which didn't fall into the above categories. There is one significant point concerning these definitions. Tidelands, in areas where harbor lines had been established, now included the area between the line of mean

low tide and the inner harbor line. This change was requested by the Commissioner of Public Lands, W.T. Forrest. Forrest, in the *Second Biennial Report of the Commissioner of Public Lands* (1892) noted that the 1890 law needed amendments to, among other things, "determine the right of the state to dispose of the land situated between the line of ordinary low tide and the harbor line" (p 46). Prior to this, these lands were platted, as required by law, and sold. While the plats, and thus the sales, often excluded out from the inner harbor line and often included bedlands, this definition change eliminated any question of the State's authority to extend sales so far off shore. This change is indicative of the liberal attitude toward sales that existed at the time as well as the desire to stimulate commerce and development.

Sections 53 and 54 instructed the Board of State Land Commissioners to "survey, plat, examine and appraise" first class tidelands and to lay out, on those tidelands, streets and alleys for public use. Where improvements existed in these areas, the owners were given the prior right to purchase the tidelands.

The preference right to purchase tidelands of the first class remained unchanged except that it was stipulated that the preference right would only apply to owners of improvements in place on or before March 26, 1890.

Section 60 stipulated that tidelands not sold by preference right could be sold by public auction. This section is significant, just as the similar 1890 provision was, in that it indicates that the State was not only selling shorelands to accommodate existing commercial development, but was actually encouraging it.

* * *

While guarding against the uncompensated use of tidelands and shorelands, the 1890 and 1895 Legislatures were

clearly liberal toward their sale. First class tidelands and shorelands were to be sold at appraised values. However, second class tidelands and shorelands were to be sold at the minimal value of five dollars per acre and third class tidelands were to be sold at five dollars per chain.

The 1895 Legislature's treatment of shorelands brings up the interesting question of whether these sales were mandatory or permissive (at the discretion of the Board of State Land Commissioners). This issue would be debated many years later, as will be discussed in later chapters. Significantly, Section 73 indicated that shorelands within two miles of a city (i.e., first class) were to be surveyed and platted only when the Board of State Land Commissioners deemed it in the best interest of the State. Clearly, it was not mandatory that these shorelands be sold. However, the sale of shorelands greater than two miles from a city (i.e., second class), discussed in Section 77, seemed more mandatory than permissive. This section stated that these shorelands "shall be disposed of upon application . . . the owner of the upland . . . shall have the right to purchase."

Similar terminology ("shall be", "shall have", etc.) was associated with all classes of tidelands, indicating that their sale may have been mandatory upon request as well. Whether it was the intent of the Legislature to make this distinction between first class shorelands and all other shorelands and tidelands has become unclear over the years. It seems likely that this is more indicative of a relatively young, law-making body in the midst of an ongoing process of policy development. The permissive approach to selling shorelands of the first class, if that was the intent, lasted only two years, until 1897. In addition to changing this policy, the 1897 Legislature appears to have been interested in consolidating and simplifying the laws pertaining to tidelands and shorelands altogether.

Clarification of Tideland and Shoreland Sales Policies-The 1897 Legislature.

The 1897 Legislature consolidated the tideland and shoreland policies (just as they were prior to 1895) and left no questions about definitions. *The Laws of Washington*, 1897, Chapter 89, Section 4, defined tidelands as being "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide" (later changed to extreme low tide). Shorelands were defined as "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow." While we cannot be positive of the intent prior to 1897, it was clear that from 1897 on, the term "shore" would refer to nontidal waters and "tide" would refer to tidal waters.

Section 39 of the same act defined first class tidelands and shorelands as those in front of or within two miles of an incorporated city. First class tidelands and shorelands also included the area between the ordinary high water mark and the inner harbor line in areas where harbor lines were established. Second class tidelands and shorelands were all those not included in the category of first class. Significantly, the definitions no longer related to improvements and the category of third class lands was eliminated altogether.

Like the earlier laws, first class tidelands and shorelands, once surveyed, platted, examined and appraised, were available for sale first to the owners of improvements placed there prior to March 26, 1890, and secondly to the abutting upland owners (Section 45). Section 47 allowed for sale of first class shorelands where no applications to purchase had been submitted. In these cases, sales would be in the same manner as for school and granted lands, i.e., by public auction.

In the 1897 act, second class tidelands and shorelands were to be sold, without platting, at five dollars per lineal chain (Section 48). This was changed in 1899 so that second class

tidelands and shorelands would be sold by public auction, but for not less than five dollars per lineal chain (*Laws of Washington*, 1899, Chapter 83). This change was requested by Commissioner W.T. Forrest, in the *Fifth Biennial Report of the Commissioner of Public Lands* (1898), "in order to prevent the further sale of tidelands of the second class for less than their real value to the state" (p 62).

Section 50 allowed for the leasing of tidelands and shorelands which were not sold earlier and for which there were no pending applications for purchase.

Clearly, by 1897 the law provided for the sale of all classes of tidelands and shorelands. This is particularly interesting in the case of shorelands. With the possible exception of Lake Washington, Lake Union and the Upper Columbia River, most shorelands around lakes and rivers in the State did not hold the same commercial and economic potential that first class tidelands did. In fact, on most lakes and rivers in the State commerce was often restricted to travel; it was easier than building roads. While travel on these lakes often required access to deep water and hence docks, this concern was only peripheral to the major economic issues concerning their first tidelands. Nonetheless, the Legislature adopted a liberal policy towards selling all classes of tidelands and shorelands even though the provisions for sale which were enacted were designed to meet the needs of industry associated with first class tidelands.

In consolidating the laws, as the 1897 Legislature did, the permissive terminology applied to first class shorelands gave way to the more mandatory "shall" language which had been applied to other tidelands and shorelands. While many years later, people would question whether these laws made sales mandatory, it appears that they were interpreted as mandatory at the time. For example, in the *Fifth Biennial Report of the Commissioner of Public Lands* (1898), Commissioner Forrest

expressed concern to the Legislature that shorelands along the Columbia River were being purchased by speculators with the result that access was being cut off for local farmers. He then recommended that the Legislature remove all unsold shorelands above Vancouver from the market (p 64). Clearly, Commissioner Forrest did not feel he had the authority to withhold these sales; he had to request that the Legislature take this action.

The basic policies established between 1890 and 1897 lasted many years. In fact, it was not until 1927 that there was any major review of the tideland and shoreland laws and, even then, the changes, in terms of allowing sales, were not significant.